

OPINIONS

OF THE

CORPORATION COUNSEL
and ASSISTANTS

JANUARY 1, 1943 to JANUARY 1, 1949

Compiled and Edited under the Supervision of
BENJAMIN S. ADAMOWSKI
Corporation Counsel



CITY OF CHICAGO
DEPARTMENT OF LAW

VOLUME XXII

PUBLISHED BY AUTHORITY OF THE CITY COUNCIL

1949



CHAMPLIN-SHEALY COMPANY, CHICAGO

PRINTERS



365

PREFACE

The custom of publishing opinions in printed and bound form was initiated by the Chicago Law Department in 1897, when opinions dating back to 1871 were published.

In 1935 my predecessor established a new policy in the publishing of opinions by correlating all of the material and following a new concept in the presentation of the opinions. In October of 1936, and again in November of 1940, opinions were published according to subject matter, and all opinions included, either being printed in full, in digest form, or by reference.

The undersigned pays tribute to his predecessor by stating that the system of indexing opinions, the format of presenting them, and the same general presentation has been followed in the compilation of this, the twenty-second Volume of Opinions.

It has been found, however, that the publishing of *all* opinions, either in full, in digest form, or by reference, is unnecessary. While opinions are indexed so that the use of the volume is enhanced, we have established the practice of publishing only those opinions in full which cover the complete subject matter referred to. Through the ingenuity and tireless efforts of Mr. Robert G. Sampson, Assistant Corporation Counsel, to whom I express my deep gratitude, all opinions from January 1, 1943, to and including December 31, 1948, were read and catalogued. Where there were a number of opinions on the same subject matter, the one containing the most complete analyzation has been included so that it was unnecessary to print or refer to others within the same sphere. As a result, we believe that the use of this Volume will permit the members of our Department and others interested in municipal government the opportunity of determining immediately and fully the conclusions and determinations of the Law Department concerning the many and varied questions covered during the six-year period of this report.

Rather than use this Preface for the expression of basic thoughts, expressions and ideas which the undersigned possesses, I want first to express appreciation to Mayor Martin H. Kennelly for having appointed me to the position which I now occupy. The members of the legal profession will, I am sure, understand when I state that in my judgment this is the finest legal position in the City of Chicago. The variety and volume of work permits the use of every facet of

ability which one may or may not possess. The contact with members of the legal profession gives opportunity for discussion and debate leading to what we hope may not always be a meeting of the minds but certainly mutual respect for the reasons prompting the final result.

Secondly, and equally important, I would prefer publicly to dedicate this Volume to an individual who, in my judgment, typifies the best possible public servant that one could imagine. Too readily are public employees condemned. Frequently those in governmental positions are referred to as "payrollers" or "politicians." It has been my pleasure to know and to work with a member of this staff before becoming Corporation Counsel and in an extremely intimate manner since my appointment. He has devoted himself to the interests of the legal problems of the City of Chicago for a good number of years. He has never deviated from the policy of giving a full share of daily effort to the municipality by which he has been retained. He is an outstanding authority on municipal law in this part of the country. It is my judgment that few men in Chicago equal his profound knowledge. None has earned the reputation for greater integrity or more sincere application to legal problems. His energies and effort are interwoven in this Volume and all previous Volumes during the time he has served. His counsel and advice to other members of the staff have become a part of their conclusions and opinions and eventually the printed word of this book. If any one individual is deserving of commendation for the successful work which has been done by the Law Department of the City of Chicago, it is the gentleman to whom I respectfully and happily dedicate this Volume—the Honorable Joseph F. Grossman, First Assistant Corporation Counsel.

May I conclude by thanking all members of the staff for their splendid co-operation and willingness to work on the endless problems which seem to besiege this branch of the government every day of its existence.

BENJAMIN S. ADAMOWSKI,
Corporation Counsel.

December 31, 1948.

FOREWORD

The opinions published in this volume cover a period of transition from war and postwar time toward peace and national security. A cursory examination of the headnotes to the opinions indicates that each period presented its own special legal problems affecting the City of Chicago and its kindred public agencies such as the Board of Education of the City of Chicago, Chicago Park District, Chicago Housing Authority, Chicago Land Clearance Commission and Chicago Transit Authority.

The branch of law concerning municipal corporations is generally regarded as highly specialized. That is hardly borne out by the variety of the subject matter treated in the opinions of the corporation counsel and in the character of litigation which constantly engages the attention of the law department. For example, its lawyers must be well versed in constitutional law, federal and state, statutory construction, statute making and drafting ordinances, resolutions and all kinds of documents. They must know the corporate powers of the municipality, the laws relating to public officers and employees, municipal finance, taxation, real and personal property, landlord and tenant, contracts, guaranty and suretyship, torts, public utilities, administrative law and procedure, eminent domain and police power in its broadest sense. They must be experienced in trial and appeals practice, federal receivership, bankruptcy and reorganization proceedings affecting public utilities, mandamus, certiorari, injunction and contempt proceedings.

Space does not permit reference to all the categories of the law in which this department is involved. It adds up to the fact that there is hardly any field of private law practice which demands the scope of research, versatility, experience and skill required of the corporation counsel and his assistants. There is here a stimulating career for any self-respecting lawyer.

It has been my privilege to serve as assistant to four very able corporation counsel*, sixteen years as first assistant. It was my duty to counsel with and review the work of my associates, as well as to perform my special assignments, and in that enviable position I learned much from their contributions. I am deeply indebted to them for their cooperation.

In the year 1947 the Honorable Martin H. Kennelly was elected Mayor and shortly thereafter the Honorable Benjamin S. Adamowski was appointed Corporation Counsel. Both came to their respective offices with a long record of business or professional success, civic

*Hon. Wm. H. Sexton, 1911-14; 1931-35.

Hon. John W. Beckwith, 1914-15.

Hon. Barnet Hodes, 1935-47.

Hon. Benjamin S. Adamowski, 1947.

or public service, and a keen sense of justice and propriety in the administration of public office. As an incident to succession in office, this department lost by resignation some brilliant and capable lawyers. Fortunately, for the City, the long continuing tenure of the present staff of the law department has developed men and women who are conscientious, experienced and expert in their work and no person has been more helpful in that accomplishment than the incumbent corporation counsel.

I express the sentiment of the entire staff of the law department in appreciation of Mr. Adamowski's unostentatious leadership, his graciousness and his professional ability and integrity.

December 31, 1948.

JOSEPH F. GROSSMAN,
First Assistant Corporation Counsel.

TABLE OF CONTENTS

	PAGE
PREFACE	iii
FOREWORD	v
AUTHORS OF OPINIONS	ix
EXPLANATORY NOTES AND DATA	x

SECTION I

Municipal Organization and Intergovernmental Relations

CHAPTER I. POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICERS

A. City Council	1
B. Police Department	31
C. Board of Health	49
D. Other Departments and Officers	104

CHAPTER II. RIGHTS AND DUTIES OF CITY EMPLOYEES

A. Civil Service	144
B. Salaries	171

CHAPTER III. ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

A. Municipal Employees' Annuity and Benefit Fund	172
B. Firemen's Annuity and Benefit Fund	178
C. Policemen's Annuity and Benefit Fund	194
D. Other Annuity and Benefit Funds	207

CHAPTER IV. RELATIONS OF CITY WITH OTHER GOVERNMENTS

A. Chicago Housing Authority	215
B. Federal Relationships	218
C. Relationships With Other Governments	228

SECTION II

Police Powers of the City

CHAPTER V. REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE

A. Foods and Cosmetics	237
B. Liquor	238
C. Weapons	243
D. Gambling and Lotteries	247
E. Other Health and Welfare Regulations	259

	PAGE
CHAPTER VI. LICENSES AND PERMITS	
A. Liquor License	288
B. Drivers' and Vehicle Licenses	296
C. Other Licenses and Permits	302
D. Refund of License Fees	354
E. Amusement Ordinance	357
CHAPTER VII. BUILDINGS AND ZONING	
A. Buildings	378
B. Frontage Consents	421
C. Zoning	428
CHAPTER VIII. RELIEF	441
CHAPTER IX. PUBLIC WAYS	
A. Dedication and Vacation	446
B. Use of Streets, Alleys and Sidewalks	451
C. Advertising and Handbills	469
D. Traffic	475
CHAPTER X. PUBLIC UTILITIES	
A. Railroads	483
B. Chicago Transit Authority	487
 SECTION III 	
Management of the Municipal Corporation	
CHAPTER XI. FINANCE	
A. Appropriations and Taxes	503
B. Management of City Funds	513
C. Judgments and Claims	531
CHAPTER XII. CITY PROPERTY	
A. Real Estate	542
B. Waterworks	544
C. Taxation of City Property	545
CHAPTER XIII. CONTRACTS	
A. Bids and Awards	546
B. Execution and Interpretation	549
C. Purchasing	566
CHAPTER XIV. PUBLIC IMPROVEMENTS	
A. Construction	578
B. Special Assessments	582
PAGE INDEX TO OPINION NUMBERS	587
INDEX	591

AUTHORS OF THE OPINIONS

Authors of the opinions recorded in this volume are indicated by their initials. The following is a list of the initials and the corresponding full names arranged in alphabetical order of the initials.

A. A. P.	A. A. Pantelis
A. E. P.	Adam E. Patterson
A. F. G.	Al F. Gorman
A. J. R.	Alexander J. Resa
B. O'H.	Barratt O'Hara
C. B. C.	Charles B. Collins
C. H. L.	Carl H. Lundquist
C. N.	Casper Nathan
C. P. H.	Charles P. Horan
E. J. B.	Emil J. Broz
E. J. K.	Edward J. Kelly
E. L. W.	Eugene L. Wachowski
E. R. H.	Edward R. Hartigan
F. P. C.	F. Patrick Conlon
F. S. L.	Francis S. Lorenz
F. T. M.	Francis T. Moran
F. V. M.	Fred V. Maguire
G. F. M. Jr.	George F. Mulligan, Jr.
H. A. I.	Harry A. Iseberg
H. A. C.	Harry A. Cooper
J. C. M.	John C. Melaniphy
J. D.	Jack DeMichaels
J. F. G.	Joseph F. Grossman
J. F. O.	John F. O'Malley
J. G. S.	James G. Skinner
J. H. S.	J. Herzl Segal
J. J. D.	James J. Danaher
J. J. M.	John J. Mortimer
L. L. K.	L. Louis Karton
M. H. J.	Martin H. Foss
M. J. N.	Maurice J. Nathanson
N. N. E.	Norman N. Eiger
P. J. L.	Patrick J. Lucey
R. J. N.	Robert J. Nolan
S. A.	Samuel Allen
S. R. D.	Sydney R. Drebin
W. H. S.	William H. Sexton
W. M. B.	William M. Barth

EXPLANATORY NOTES AND DATA

KEY TO CITATION ABBREVIATIONS

The City Code has been cited as in the following examples:

Code '11: 1541	refers to section 1541 of the <i>Chicago Code of 1911</i> .
Code '22: 2063, 2064	refers to sections 2063 and 2064 of the <i>Chicago Municipal Code of 1922</i> .
Code '31: 4194	refers to section 4194 of the <i>Revised Chicago Code of 1931</i> .
Mun. Code: 25-8	refers to chapter 25, section 8 of the <i>Municipal Code of Chicago</i> , adopted on August 30, 1939 and subsequently amended.

The revised Illinois statutes have been cited as in the following examples:

IRS '39, 98: 18	refers to chapter 98, section 18 of the Illinois State Bar Association's <i>Illinois Revised Statutes of 1939</i> .
ISBS '37, 24½: 12	refers to chapter 24½, section 12 of the Illinois State Bar Association's <i>Illinois Revised Statutes of 1937</i> .

Opinions of the Corporation Counsel of Chicago and Assistants have been cited as in the following examples:

Op. Corp. Coun. (1920-23) p. 42	refers to <i>Opinions of the Corporation Counsel of Chicago and Assistants</i> rendered from January 1920 to April 1923 inclusive, page 42.
19 Op. Corp. Coun. 409 (No. 9245)	refers to <i>Opinions of the Corporation Counsel of Chicago and Assistants</i> volume 19, page 409, opinion number 9245.

*

*

*

*

*

*

ALR	<i>American Law Reports.</i>
Coun. J.	<i>Journal of the Proceedings of the City Council of Chicago.</i>
CJ	<i>Corpus Juris.</i>
Ill. Laws	<i>Laws of the State of Illinois.</i>
Ill. Stat. (Jones Ann.)	<i>Jones Illinois Statutes Annotated.</i>
Ill. Stat. Ann. (Smith-Hurd)	<i>Smith-Hurd Illinois Annotated Statutes.</i>
Op. Ill. Atty. Gen.	<i>Opinions of the Attorney General of Illinois.</i>
Op. Atty. Gen. of US	<i>Opinions of the Attorney General of the United States.</i>
RCL	<i>Ruling Case Law.</i>
USCA	<i>United States Code Annotated.</i>
USHA	<i>United States Housing Authority.</i>
US Stat.	<i>United States Statutes at Large.</i>

DATA GIVEN WITH REPORTED OPINIONS

Above each opinion reported in this volume there is printed in italics the number of the opinion, the office or officer to whom the opinion was written, the initials of the person who prepared the opinion and the date of the opinion.

When the office or officer to whom the opinion was written is not indicated, the opinion was addressed to a person who was not a municipal official, having public business with the city.

NUMBERING OF OPINIONS

The numbering of opinions is a continuation of the chronological sequence of Volume XXI of the *Opinions of the Corporation Counsel and Assistants*; the arrangement of the opinions is according to their subject matter.

For reference convenience, a table of the opinion numbers with corresponding page numbers is given in this volume at page 587.

SECTION I
INTERGOVERNMENTAL RELATIONS AND
MUNICIPAL ORGANIZATIONS

CHAPTER I — POWERS AND DUTIES OF CITY COUNCIL AND CITY OFFICES

A. CITY COUNCIL

WATER OUTSIDE CITY LIMITS

(No. 10821—Alderman, 41st Ward—M. H. F.—October 20, 1944.)

In the absence of any formal contract the City Council may repeal an order authorizing a resident of Norwood Township to tap a city water main.

A non-resident has no inherent right to be supplied with City of Chicago water.

Citation: 315 Ill. 328.

OPINION OF FOREGOING SYNOPSIS

The department is in receipt of your letter of October 18, 1944, stating that sometime ago you introduced an order in the City Council to permit a certain individual, who lives in Norwood Township, to tap the city water main; that since that time the individual has permitted several of his neighbors to tap onto his line; and that these last named individuals are now complaining to you that the first named individual is charging them excessive amounts for the water. You ask our advice as to what measures can be taken in the matter.

As we understand the facts given us all of the parties affected reside outside the limits of the City of Chicago. Being non-residents they do not have any inherent right to be supplied with City of Chicago water or to tap the city's water mains to secure such supply. In our opinion the whole matter might be easily cleared up by the passage of a council order repealing the order authorizing the tap and directing the Commissioner of Public Works to seal the main. If the City Council saw fit to take such action it would doubtless be justified and fortified by the decision of the Supreme Court of Illinois in *Gage v. Village of Wilmette*, 315 Ill. 328, wherein an analogous situation was presented, and the court held that the village had the right to discontinue supplying water to an outsider and that the outsider could not succeed in a suit for mandatory injunction to compel the municipality to continue the water supply.

In reaching this conclusion we assume that there is no formal contract in existence whereby the city has agreed to furnish the water.

TRANSFERRING DUTIES

(No. 10832—Commissioner of Buildings—A. F. G.—January 8, 1945.)

The City Council has the power to transfer the duties previously exercised by the Board of Health with reference to ventilation and industrial sanitation to the Building Department.

Citations:

Statutes: IRS '43, ch. 24, sec. 9-14, 9-16.

IRS '43, ch. 24, Art. 23, pars. 23-64, 23-81, 23-82.

Ordinances: Municipal Code, ch. 13, secs. 46-20, 81-8, 81-20.

OPINION OF FOREGOING SYNOPSIS

Your letter of December 29, 1944, is as follows:

"The 1945 appropriation ordinance as recommended for passage in Council Committee Pamphlet No. 66, indicates that the Bureau of Ventilation Inspection is being transferred from the Board of Health to the Department of Buildings.

"Question is raised as to the validity of inspection of ventilation equipment as a building department function. It is my understanding that as a health measure such ventilation inspection is proper and legal. Your opinion on the above subject is urged before the ordinance becomes effective.

"Also in connection with this transfer of the Bureau of Ventilation Inspection, it will be necessary that several portions of the Municipal Code be amended to transfer jurisdiction and authority. May I request that you have prepared the necessary amendments in order that the City Council might pass same at the time of the passage of the 1945 appropriation ordinance?"

We have heretofore furnished you draft of a proposed ordinance amending sections 9-6, 9-8, 9-9, 9-11, 9-12, 81-8, 81-20, 46-20 and 13-1 of the Municipal Code of Chicago and adding two new sections to chapter 13 of said code. These amendments were made necessary by the transfer in the annual appropriation ordinance for 1945 of the "division of heating, ventilation, and industrial sanitation" from the board of health to the department of buildings.

You raise a question in the second paragraph of your letter as to the validity of transferring this division which exercises duties for the protection of public health, from the board of health to the department of buildings.

A similar question was raised a few years ago when an ordinance creating a housing board of inspection with authority to exercise the powers of inspection theretofore invested in the board of health, the department of buildings and other departments was before the City Council.

At that time we furnished an opinion to the Chairman of the Housing Committee of the City Council upholding the power of the City Council to make the proposed transfer of duties. In this opinion we said:

"The power of the City of Chicago with respect to the protection of the health of the inhabitants of the City, and the power to prescribe

the manner of constructing buildings have been conferred by the General Assembly of Illinois upon the City Council by article 23, chapter 24, Illinois Revised Statutes 1941. The powers granted to the City Council by this article include among other things, the abatement of nuisances and the power 'To do all acts, and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.' (Illinois Revised Statutes 1941—chapter 24, article 23, paragraphs 23-61, 23-81.) In addition the City Council is authorized by statute, to appoint a Board of Health and to prescribe its powers and duties. (Chapter 24, article 23, paragraphs 23-82.)

"No power is granted to the Board of Health of the City of Chicago, by the provision of the statute which authorizes the establishment of the Board of Health. On the other hand, the statute plainly contemplates that the powers and duties of the Board of Health shall be such as are prescribed by the City Council.

"Similarly the Commissioner of Buildings is given no power by statute, his powers and duties being prescribed by ordinance of the City Council.

"The City Council having power to create these officers undoubtedly has power to abolish them or transfer the duties heretofore exercised by them to some other officer or board.

"Section 9-14, chapter 24, Illinois Revised Statutes 1941 is as follows:

'By ordinance passed by a two-thirds vote of all the aldermen elected, the city council in its discretion, may provide for the election by the electors of the city, or for the appointment by the mayor, with the approval of the city council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any of them, and any other officers which the city council considers necessary or expedient. By ordinance or resolution, to take effect at the end of the current fiscal year, the city council, by a like vote, may discontinue any office so created, and devolve the duties of that office on any other city officer. After such discontinuance, no officer filling any office so discontinued shall have any claim against the city for salary alleged to accrue after the date of discontinuance.'

and section 9-16, same chapter after providing that all officers of any city shall be appointed by the mayor by and with the advice and consent of the city council has this provision:

"The city council by ordinance, not inconsistent with this act, may prescribe the duties, define the powers and fix the term of office of all such officers.

"The proposed ordinance creates a Housing Board of Inspection, composed of certain existing officers of the city with power with respect to the inspection of dwelling buildings, similar to that now invested in the building, health and other departments.

"It provides also for the creation of a Housing Board of Appeals composed of five members, three of whom shall not have less than ten years experience in the design, construction or operation of buildings, whose duty it shall be to review the findings of the Housing Board of Inspection, to conduct public hearings on appeals taken by owners or other persons in interest, who shall have full opportunity to be heard and at the conclusion of the hearing to affirm or set aside the order of the Housing Board of Inspection.

"From the foregoing we are of the opinion that the Council has power to create these offices and impose on them powers and duties heretofore vested in other city officers.

"There is nothing new or novel in this procedure. The City Council frequently transfer powers and duties from one department to another. Less than two years ago the duty of plumbing inspection which had been for years in the Board of Health was by ordinance removed from that department and placed in the department of buildings. At that time in response to a request for an opinion as to the legality of this action, we said: 'It is our opinion that the City Council under this statute has power by ordinance to place the regulation and inspection of plumbing in buildings in any department it deems proper.'"

We are, therefore, of the opinion the Council has power to transfer the duties previously exercised by the board of health with reference to ventilation and industrial sanitation to the department of buildings.

JUNK DEALERS' ORDINANCE

(No. 10841—Alderman, 41st Ward—M. H. F.—April 17, 1945.)

The proposed amendment to the junk dealers ordinance providing that no license for a junk yard shall issue until the application for license is approved by the City Council Committee on Building and Zoning, would not be valid. The City Council and its committees are a legislative body and a legislative body as such cannot assume to perform executive functions provided for in the amendment.

Citations:

Ordinances: Municipal Code, 143, 143-1, 143-3, 143-5, 143-6.

Cases: 245 Ill. 288.

328 Ill. 552.

356 Ill. 230.

Reference: 10 Op. Corp. Coun. 10.

OPINION OF FOREGOING SYNOPSIS

Your letter of April 10, 1945 states that consideration is being given to a proposed ordinance amending the city's junk dealers ordinance so as to provide that no license for a junk yard shall issue until the application for license is approved by the City Council Committee on Building and Zoning. Our advice is sought as to whether such an ordinance would be valid.

Chapter 143, entitled "Junk Dealers and Peddlers", of the Municipal Code of Chicago, covers the matter of licensing and regulating junk yards. It defines the term "junk yard" (Sec. 143-1), provides that no person shall engage in the business of keeping a junk yard without being first licensed for such purpose (Sec. 143-2), requires an application for license to be made in conformity with the general requirements of the Municipal Code relating to applications for licenses (Sec. 143-3), authorizes the Mayor to direct the issuance of licenses to such persons as shall produce satisfactory evidence of good character and reputable standing (Sec. 143-5), and specifically prohibits the location of a junk yard within 400 feet of certain institutions, or in any block in which two-thirds of the buildings

on both sides of the street are used exclusively for residence purposes, or residence and wholesale or retail store purposes, or used exclusively for wholesale or retail store purposes, without the written consents of a majority of the property owners, such consents to be filed with the Commissioner of Buildings, who is required to act upon the application. Further, the section makes it unlawful to locate or operate a junk yard upon any street upon which is located a street railway or bus (either trolley or gasoline) line. (Sec. 143-6). The chapter contains several other regulatory provisions, consideration of which appears unnecessary for the determination of this question.

It will be noted that in enacting the ordinance the City Council has exercised the authority conferred upon it by statute to legislate upon the subject of junk yards, and by ordinance has provided for the licensing, locating, and regulating of places of business of dealers in junk.

The City Council and its committees act in a legislative capacity and are the legislative department of the city government. By Article III of the Constitution of Illinois the powers of the government of the State are divided into three distinct departments—the legislative, executive and judicial, and it is generally provided that no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others.

In an opinion given the City Council July 8, 1916, Opinions of the Corporation Counsel, Volume X, page 10, this department cited the case of *People v. Olson*, 245 Ill. 288, in support of the proposition that the division by the Constitution of the powers of the government of the State into three departments, namely, legislative, executive and judicial, applies to their principal, the state, and expressed the view that the Committee on Parks, Playgrounds and Bathing Beaches could not properly recommend legislative action to the City Council, pass on such recommendations as aldermen from their respective wards, and then act as members of a committee to carry out and execute the legislative action taken by them as aldermen.

Adhering to the views expressed in the above mentioned opinion our conclusion is that the Committee on Building and Zoning should not assume to perform executive functions, and that if the junk dealers ordinance were amended so as to require the approval by such Committee of applications for licenses to operate junk yards, the amendment would be invalid.

If it is the desire of your committee to further restrict the issuance of licenses to operate junk yards, it is believed that this should be accomplished by an amendment to Chapter 143 of the Municipal Code which would exact compliance by the applicant for license with additional requirements, which additional requirements should be clearly set forth in the chapter and enforced by executive officials of the City. Municipal ordinances placing restrictions upon the use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business and must admit to the exercise of the privilege all citizens alike who will comply with such rules and conditions, and such ordinance must not permit the exercise, or the opportunity for the exercise, of any arbitrary discrimination by municipal authorities, between citizens who shall apply for that privilege. *Wilmot v. City of Chicago*, 328 Ill. 552, 560; *Lydy v. City of Chicago*, 356 Ill. 230.

WAGE INCREASE

(No. 10851—Chairman, Finance Committee—J. F. G.—July 27, 1945.)

The City Council is prohibited by law from changing rates of compensation as fixed in the annual appropriation ordinance for employees who are compensated on a per diem, monthly, or annual basis. The City Council cannot provide in the appropriation ordinance an amount to cover the difference between the rates authorized by the Federal Wage Adjustment Board and the rate fixed in the appropriation ordinance.

Citations:

Constitution: Illinois 1870, Art. IV, Sec. 19.

Statute: IRS '43, ch. 24, sec. 9-99.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of July 18, 1943 transmitting notices from officials of labor unions advising you of wage increases in a number of trades by authority of the Federal Wage Adjustment Board effective on various dates in the year 1945 from February 21 to September 1. You have requested our opinion if the City Council may change the rates of compensation fixed in the annual appropriation ordinance for the year 1945 to conform with the authorized increases in wages referred to and if the rates of compensation cannot be effected by Council action during the year 1945 whether the City Council may provide in the 1946 appropriation ordinance for the payment of additional compensation to the employees affected by the authorized wage increase to cover the difference between the authorized rates and the rates fixed in the 1945 annual appropriation ordinance.

As stated in your letter, it has been the general policy of the City Council in fixing the compensation of employees by the annual appropriation ordinance to adopt the prevailing wage rates of union labor established in private employment. Unfortunately, however, the power of the City Council in respect of the fixing of compensation, as well as the exercise of any other power, is limited by the Constitution and laws of this State. The City derives all of its power from the legislature and it cannot exercise any power which the legislature has not given to it or which the legislature by Constitution is not authorized to grant to the City.

The Cities and Villages Act provides that the City Council shall pass an annual appropriation ordinance at the beginning of each fiscal year for the appropriation of such sums of money as are deemed necessary to defray all expenses and liabilities of the municipality to be paid or incurred during that fiscal year and no further appropriation may be made prior to the passage of the next succeeding annual appropriation ordinance except in certain cases of emergency caused by any casualty or accident happening after the annual appropriation ordinance is passed or to suppress or prevent the spread of disease or to prevent or remove imminent danger to persons or property. Obviously, with such limitations, it is impossible for any city, village or incorporated town to make effective any wage increases excepting at the beginning of each fiscal year which, in the City of Chicago, is concurrent with the calendar year.

Moreover, Section 9-99 of the Revised Cities and Villages Act, approved August 15, 1941, provides that the City Council may fix the salary of all city officers and of all employees in the annual appropriation ordinance and

that the salaries so fixed shall never be increased nor diminished during the fiscal year for which the appropriation is made. It is also therein provided that no compensation shall be paid to any city officer or employe in addition to that provided in the ordinance fixing his salary.

The law does not distinguish between the salaries or wages which are fixed in the annual appropriation ordinance on a per diem basis or on the monthly or annual basis. The law expressly precludes the possibility of an appropriation for compensation to any employe to make up the difference between the prevailing union scale of wages and the rates established by the annual appropriation ordinance for any preceding year. This is consistent with Section 19 of Article IV of the Constitution of Illinois which provides that the General Assembly shall never grant or authorize extra compensation for or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract made.

We are constrained to advise you that the City Council is prohibited by law from changing the rates of compensation fixed in the annual appropriation ordinance for the year 1945 for employes who are compensated on a per diem basis or on a monthly or annual basis and from providing in the 1946 annual appropriation ordinance an amount to cover the difference between the rates authorized by the Federal Wage Adjustment Board and the rate fixed in the 1946 appropriation ordinance.

MUNICIPAL PARKING LOT

(No. 10865—A. F. G.—October 30, 1945.)

At the present time the City of Chicago has no authority to exercise the powers in respect to municipal owned parking lots which all the other municipalities in the state enjoy.

Citation:

Statute: IRS '45, Sec. 52.1-1, Revised Cities & Villages Act.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of October 22, 1945 which is as follows:

"The Parking Committee of the State Street Council will very shortly be making a thorough study of the parking problem in the central business district of Chicago. One of the items that we would like to be more familiar with pertains to the legality of municipally owned and operated parking lots.

"We would like to have you tell us whether or not the State legislature passed any new laws during their last session which would in any way permit municipally owned and operated parking lots in Chicago.

"We would appreciate any information you can give us along this line."

In 1943 the legislature passed an Act which authorized municipalities of not more than 150,000 inhabitants to own and operate parking places for motor vehicles within the municipality; to fix, charge and collect rent,

compensation or fees for the use thereof; to improve such land with buildings, equipment and facilities for the comfort and convenience of persons parking motor vehicles thereon; to acquire property, rights and easements for any of the foregoing purposes by gift, lease, purchase condemnation or otherwise; to borrow money for any of such purposes payable with interest at not to exceed six (6) per cent per annum, solely upon the revenues derived therefrom; and to issue revenue bonds or certificates of indebtedness therefor in such amounts and on such conditions as it shall prescribe. (Section 52.1-1 Revised Cities and Villages Act.)

Under this Act every municipality in the State except Chicago may exercise the powers enumerated in the foregoing section. At the recent session of the General Assembly a bill, HB. 116, which amended this section by striking out the population limitation, making the Act applicable to Chicago, passed the House but failed of passage in the Senate.

As the law now stands the City of Chicago has no authority to exercise the powers in respect to parking lots which all the other municipalities in the State enjoy.

CONTROL OF BRIDGES

(No. 10869—Alderman, 41st Ward—A. F. G.—November 28, 1945.)

The city has the power to enact an ordinance limiting the passage of pleasure craft with high masts under bridges to certain times of the day. Such an ordinance would eliminate the necessity of opening the bridges for individual boats.

Citations:

Statute: IRS '45, ch. 24, art. 23-38, 23-48, Revised Cities and Villages Act.

Cases: 107 Ill. 678, 683.

Other reference: 12 Op. Corp. Coun. 743.

OPINION OF FOREGOING SYNOPSIS

Your letter of October 29, 1945, requesting an opinion "on the possibility of enacting an ordinance to limit the passage of pleasure craft with high masts under the bridges on the Chicago River to certain times of the day, which would eliminate the necessity of opening bridges for individual boats", has been received.

In an opinion published in Volume 12, Opinions of the Corporation Counsel, at page 743, we held that the city had power by ordinance to regulate the hours for opening and closing bridges over the Chicago River and had the continuing power to make and change such regulations as the conditions of traffic on and across the river warranted.

In this opinion we quoted from a decision of the United States Supreme Court in a case in which the authority of the City of Chicago over the Chicago River was very fully discussed. The court said:

"The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

"But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." *Escanaba and Lake Michigan Transportation Company v. City of Chicago*, 107 Ill., p. 678-683.

Article 23 of the Revised Cities and Villages Act delegates to the City such power to control the use of bridges within the City as originally existed in the State of Illinois, by sections 23-38 and 23-48 of said Article, which are respectively as follows:

"To construct, repair, and regulate the use of bridges, viaducts and tunnels."

"To regulate the use of harbors, towing of vessels, and the opening and passing of bridges."

It is our opinion, therefore, that the City may enact an ordinance limiting the passage of certain types of vessels through bridges to certain times of the day.

ANNEXATION

(No. 10873—C. B. C.—December 6, 1945.)

There is no necessity for the City of Chicago to annex the filled in parts of Lake Michigan, as the City has effective control over the land without annexation.

The jurisdiction of municipalities of the State of Illinois for the purpose of enforcing health and quarantine ordinances extends one-half mile beyond the corporate limits. Annexation would be necessary only where the filled in land is devoted to residential or private use.

Citation:

Statute: IRS '45, ch. 24, sec. 7-7.

OPINION OF FOREGOING SYNOPSIS

In your letter of recent date concerning the above subject, you state that in the past the City of Chicago has filled in parts of Lake Michigan and inquire what, if any, action was taken by the city to include this land within the new expanded city limits. You also ask what procedure was followed if legislative action was taken.

We note your letter does not refer specifically to any particular filled in land, nor to the purpose for which said land may have been acquired by the city.

The revised Cities and Villages Act of the State of Illinois provides whenever any contiguous unincorporated territory is owned by any municipality, that territory may be annexed by the passage of an ordinance to that effect, describing the territory to be annexed. (Ill. Rev. Stat. 1943, Chap. 24, Sec. 7-7.)

Although the City of Chicago has filled in parts of Lake Michigan it has never had occasion to annex the filled in land, because the city has just as effective control over land owned by it as it has in case of annexation.

The jurisdiction of municipalities of the State of Illinois for purposes of enforcing health and quarantine ordinances extends one-half mile beyond the corporate limits, and for all police purposes the jurisdiction over all waters bounding on municipalities extends three miles beyond the corporate limits.

Annexation would be necessary only where the filled in land is devoted to residential or other private uses.

JUDGMENT AGAINST CITY EMPLOYEE

(No. 10913—F. V. M.—September 25, 1946.)

The City of Chicago has no authority or power to compel its employees by legal action to pay judgments entered against them in favor of private individuals.

Citations:

45 Ill. 135.
170 Ill. 580.
124 Ill. App. 64.
256 Ill. App. 226.
315 Ill. App. 436, 443.

OPINION OF FOREGOING SYNOPSIS

Your letter of September 10, 1946 addressed to Mr. William McKenna, secretary to Mayor Edward J. Kelly, has been forwarded to this office for reply.

In your letter you call Mr. McKenna's attention to an obligation of one John Williams, a city employee, which is represented by judgment obtained in the Municipal Court of Chicago in the year 1942. You state

that you have, in the past, repeatedly communicated with Mr. Williams relative to this judgment as well as his superior and the Civil Service Commission and, up to date, have received no cooperation.

In cases of this nature involving employees of private concerns two methods are open to persons seeking payment of judgments, the threat of discharge by the employer or legal action against the employer for collection of the amount of the judgment out of unpaid salary or wages.

Neither of these methods is available in connection with unpaid obligations of employees of municipal corporations and the courts have so held in many cases.

In the case of the *City of Chicago v. Millar J. Condell*, 124 Ill. App. 64, wherein a police officer charged as follows—"('Violation of Rule 69). Neglect to pay within a reasonable time a just indebtedness in violation of the book of Rules and Regulations governing the Police Department"—sued out a writ of certiorari for the purpose of having reviewed the action of the Civil Service Commission in discharging him. The court said:

"The charges and the specifications under them should certainly be considered together in determining their nature. So considered they show, although in rather vague and obscure terms, that on a claim arising from a business dispute, in which, from the statement of it in the specifications, one might indeed suppose the petitioner had the juster side of it, there was a judgment rendered against him by a justice of the peace, the said judgment being rendered in his absence after several continuances. Whether his absence was neglectful or involuntary because of his duties, does not appear. Even if the specifications and their attachment, which indicate the nature of the unpaid indebtedness and thus limit and define the charge, should be altogether disregarded, as we do not think they should be, the case is not materially improved for appellee. 'Violation of rule 69' means nothing in the absence of the rule from the return, and 'neglect to pay within a reasonable time a just indebtedness' does not exclude a perfectly honest inability to do so, resulting from unforeseen accident. That to be a dishonest debtor, a confidence man, or, in common parlance, 'a dead beat,' one, in the language of counsel for the city, 'who culpably fails to discharge a just debt after a reasonable opportunity' and with ability to do so,—is a sufficient cause for separation from the city's service, may be conceded without any effect upon the position taken here, that the cause set forth in the case at bar was no cause at all.

"If the Civil Service Commission had power to remove petitioner for this reason, they would have the equal power to do so because he voted the Republican or Democratic ticket, or attended the Methodist or the Catholic church."

In the case of *Lamb v. Lamb*, 256 Ill. App. 226, the court said:

"By this appeal George K. Schmidt as comptroller of the City of Chicago, and Louis E. Gosselin as deputy comptroller of the City of Chicago, seek to reverse an order of the circuit court of Cook county adjudging them in contempt of court and imposing a fine against each of \$25.

"Mary J. Lamb filed her bill in the nature of a creditor's bill against Dennis J. Lamb, the substance of which was that she had obtained a judgment of more than \$6,000 against Dennis J. Lamb and had exhausted all means under the law in an unsuccessful attempt to collect it; that Dennis J. Lamb was a civil service employee of the City of Chicago in the department of gas and electricity, at a salary of \$225 a month; and prayed that a receiver be appointed to collect Dennis J. Lamb's salary and to apply the proceeds towards satisfaction

of the judgment. Dennis J. Lamb alone was made a party defendant. He filed his demurrer, which was overruled and the bill was then taken as confessed against him. A receiver was appointed to collect and receive his salary as it came due. Afterwards a demand was made by the receiver on the comptroller and his deputy for the salary earned after the appointment of the receiver. The demand was refused and a petition was thereafter filed by the receiver asking that a rule be entered that the comptroller and his deputy show cause why they should not be punished for contempt of court. The rule was entered and the comptroller and his deputy filed a joint and several answer. Afterwards the court found defendants guilty of contempt and imposed a fine against each as stated."

The court then quotes from the *Merwin v. City of Chicago* case (45 Ill. App. 133) in which it was held that a municipal corporation was not subject to garnishment, and on this question said (p. 135):

"It (the question) must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers, to a very large extent. They control pecuniary interests of great magnitude and vast numbers of human beings, who are more dependent upon the municipal, for the security of life and property than they are on either the State or the federal government. To permit the great public duties of this corporation to be imperfectly performed in order that individuals may the better collect their private debts would be to pervert the great objects of its creation. That its efficiency for purposes of government would be impaired by holding it liable to garnishment cannot be doubted. A large and growing city like Chicago must constantly have hundreds of persons in its employment, and if the city cannot, at short intervals, make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employees, it will not only be engaged in much expensive and vexatious litigation in which it has no interest, but, if unable to safely pay its employees and contractors, it may lose the services of persons that may be of much value."

In the case of *Brazil v. City of Chicago*, (315 Ill. App. 436, the court said on page 443:

"When we come to consider the facts in the instant case, we find that there was a judgment entered against the city for \$1,553.19 and costs. To enforce the collection of this amount from the city it will be necessary that an execution be issued and levied upon the property of the city, a municipal corporation. Under the authorities cited and quoted from in this opinion, we are of the opinion that the court erred in entering the judgment herein in favor of petitioner for the reason that a municipal corporation cannot be, as has been held in the *Addyston Pipe Co. case*, 170 Ill. 580, made an instrument or agency for the collection of private debts. * * *

You can readily see from the foregoing that the city is powerless to help you in collecting the judgment you refer to.

HORSE LICENSES

(No. 10922—Alderman, 43rd Ward—F. T. M.—October 29, 1946.)

The City Council lacks the authority to enact an ordinance licensing horses or their riders.

Citations:

Statute: IRS '45, Ch. 24, 23-85. Ch. 57½, Sec. 7a.

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date requested an opinion as to the power of the City Council (1) Licensing riders of horses, and (2) Licensing the horses. Your letter referred to an ordinance passed by the Forest Preserve District entitled "Regulation and Licensing of Equestrian Travel", which requires a license for both rider and horse.

The question arises as to the power of the Forest Preserve District to enact this ordinance. Section 7a of Chapter 57½, Ill. Rev. Stats. 1945, provides as follows:

"The Board of Commissioners of any forest preserve district organized hereunder may by ordinance regulate, control and license equestrian travel on all paths, driveways and roadways within the forest preserve district." Added by Act approved June 30, 1945.

The Forest Preserve ordinance was enacted November 21, 1945, to be effective on or after June 30, 1946, and pursuant to power previously granted by the State Legislature.

The next question is whether the City Council could enact a similar ordinance. Section 23-85 of Article 23 of the Revised Cities and Villages Act reads in part as follows:

"To regulate and prohibit the running at large of horses * * * and dogs, and to impose a tax on dogs".

Which clearly manifests the intention of the legislature to grant to a municipality the power to impose a tax only upon dogs and exempting from the exercise of that power horses and other animals designated therein.

A municipal corporation exercises only delegated power. The authority to exercise any power or to pass any ordinance must be found in some Act of the General Assembly by which the authority is expressly given or necessarily implied for the proper and effective execution of some power expressly granted. The power to license riders of horses has not been granted by the General Assembly and in our opinion cannot be implied from any power expressly granted.

It is our opinion that the City Council lacks the authority to enact an ordinance licensing horses or their riders.

LEGISLATIVE REFERENCE BUREAU

(No. 10935—City Council—M. H. F.—January 22, 1947.)

The proposed ordinance creating a City Council legislative reference bureau is invalid in that it provides for the performance of functions which are purely of a legal nature and which are to be performed by the Corporation Counsel.

Citations:

Statute: Act of 1905, Art. XII Cities and Villages Act.

Cases:

306 Ill. 119.
313 Ill. 346.
344 Ill. 462, 475.
345 Ill. 486.
354 Ill. 102.
258 Ill. App. 271.
260 Ill. App. 384.
83 S. C. 186.

OPINION OF FOREGOING SYNOPSIS

At the meeting of your honorable body held January 15, 1947 an ordinance was passed creating a city council legislative reference bureau and defining the powers, functions and duties thereof, which ordinance had theretofore been recommended by the Committee on Judiciary and State Legislation, deferred and published, and may be found printed on pages 6786 and 6787 of the Journal of the Proceedings of the City Council for December 30, 1946.

At the time the ordinance was passed, and following the debate which preceded its passage, the understanding was had that if this department rendered a written opinion before the next meeting of the city council to be held January 23, 1947, to the effect that the establishment of the bureau was illegal, the vote by which the ordinance was passed would be reconsidered.

Our examination of the ordinance and investigation of the law applicable thereto leads us to the conclusion that the city council of a council governed city such as the City of Chicago, has the right by ordinance to create such bureau or bureaus, by whatever name or names as may be designated, to aid it and its members in the matter of collecting, evaluating and disseminating to members ordinances, resolutions and orders introduced in its own body, including summaries thereof, and also ordinances of other municipal corporations, as may aid its own members in the performance of their duties.

The city council also, in our opinion, may authorize the office of such a bureau to be established in the City Hall, prescribe the hours during which it shall be open for business, and may require the Municipal Reference Library, the Board of Directors of the Chicago Public Library, and the department of law to cooperate with the bureau by loaning to it books, periodicals, documents, or other printed data belonging to their respective offices.

While the creation of another bureau or municipal agency for the purpose of collecting municipal ordinances and useful pamphlets and data pertaining to the activities of municipal corporations other than the City of Chicago, will doubtless result in duplicating one of the principal functions of the Municipal Reference Library, the question whether the city

and its taxpayers should be burdened with this duplication is we believe a legislative matter for the city council to determine in the exercise of a sound legislative discretion.

The ordinance under consideration, however, does not stop here. It also provides for the creation of the office of bureau director, who shall be appointed by the Committee on Committees and Rules, and confers upon such director authority to appoint his technical and clerical assistants in such number and for such compensation as may be provided in the annual appropriation ordinance. Furthermore, the ordinance fixes upon the bureau the duty to prepare, upon the request of any member of the city council, ordinances, resolutions and orders proposed to be introduced in the city council by said member, including amendments, substitutes and revisions of existing or proposed ordinances, resolutions and orders; the duty to afford any such member all legal assistance and information in relation thereto as may be necessary or practicable; and furthermore, the duty to revise such subjects and chapters of the Municipal Code of Chicago as are in need thereof and to present drafts of ordinances effectuating such revisions to the city council. In connection with such revisions, the bureau is vested with authority to recommend, and is charged with the responsibility of recommending the revision, simplification and rearrangement of existing ordinances, and the elimination from such ordinances of obsolete, superseded, duplicated and unconstitutional ordinances, or parts of ordinances, without making changes in the substantive provisions of existing ordinances.

These last mentioned activities are such as are embraced within the practice of law. They are functions and duties which clearly come within the special training and skill of the profession of the law. They involve studies of constitutional law and the comparative law of various states affecting municipal corporations. They involve studies of the decisions of the courts interpreting the constitution and laws of the United States and of the several states. Yet the ordinance provides that they are to be carried on outside the law department, beyond the control of the corporation counsel who is the legally constituted head of the law department, by a city council created bureau, operated by a director appointed by the council Committee on Committees and Rules and a staff selected by the bureau head.

May these functions and duties be removed from the direction and control of the corporation counsel and placed with a bureau outside the law department, is the question now before us for determination.

It is fundamental that no person or corporation in this state may engage in the practice or profession of a lawyer who has not been properly admitted to the bar by the Supreme Court of this state upon compliance with the rules of the court made for that purpose. The question of what constitutes the practice of law has been passed upon by the Supreme Court in several cases. In *The People ex rel v. Peoples Stock Yards State Bank*, (1931), 344 Ill. 462, at page 475 of its opinion, the court said:

" * * * the practice of law involves not only appearance in court in connection with litigation but also services rendered out of court. * * * The practice of law also includes the giving of advice or rendering services requiring the use of legal skill or knowledge."

The court approved this definition:

"Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."

See also *The People v. Real Estate Tax-payers* (1933), 354 Ill. 102; *The People v. Hubbard* (1924), 313 Ill. 346; in *Matter of Duncan*, 83 S. C. 186.

Aside from ward matters which deal mainly with local regulations and privileges, the scope of municipal legislation relates to the acquisition of private property for public use by purchase or condemnation, contracts for public improvements, contract ordinances with public utilities and others for the use of public ways and public property in the performance of public services, and similar action establishing legal relations between the city in its corporate capacity and private parties, and defining their respective legal obligations.

All council action must meet these tests: (a) whether the power to legislate upon the subject matter has been delegated to the city council by state law; (b) whether the state law delegating such power is constitutional; (c) whether the legislation is fairly within the scope of the subject matter lawfully delegated to the city council; (d) whether the legislation is a reasonable exercise of the power lawfully delegated to the city council; (e) whether the language employed in the legislation is clear and unambiguous, expressing the intent of the city council; and (f) whether the form of the legislation is in conformity with the statutory requirements for the character of legislation involved.

In their very nature the drafting of the documents which the proposed bureau is called upon to prepare and the application of the legal tests above stated to properly advise the members of the city council require the skill and experience of lawyers and constitute the practice of the law.

Section 7 of Article XII of the Cities and Villages Act of April 10, 1872, Article XII added by act approved May 18, 1905, adopted November 7, 1905 (paragraph 176, chapter 24, Illinois Revised Statutes, 1945), provides as follows:

"The head of the law department of the city shall be the corporation counsel, and the duties heretofore performed by the city attorney shall be performed by the corporation counsel and his assistants. From and after the adoption of this act the office of city attorney shall be abolished.

"The corporation counsel shall be and act as the legal adviser of the city council and of the several officers, boards and departments of the city. He shall appear for and protect the rights and interests of the city in all actions, suits and proceedings brought by or against it or any city officer, board or department, including actions for damages when brought against such officer in his official capacity; provided, however, that when an officer or employee of the city is sued personally, even if the cause of action arose out of his official duties, the corporation counsel shall appear for such officer or employee only in case the city council directs him to do so."

Article XII, commonly referred to as the city's "Little Charter," relates specifically and wholly to the City of Chicago.

Exercising the charter powers delegated to the city, the city council at an early date established by ordinance an executive department of the municipal government known as the department of law, to embrace the corporation counsel and such assistants and clerks as may be provided for in the annual appropriation ordinance. Chapter 8 of the Municipal Code of Chicago, which establishes the department, creates the office of corporation counsel, and specifies his duties. Section 6-6 provides that the corporation counsel shall draft such ordinances as may be required of him by the city council or by any committee thereof. By section 6-7 the

corporation counsel is given general supervision of the revision of ordinances and the insertion of general ordinances into the municipal code. Section 1-4 provides that the corporation counsel shall prepare and publish revised sheets of every loose-leaf page in need of revision by reason of amendment or repeal. Section 1-8 requires submission to the corporation counsel of additions to the code for numbering before passage.

The above quoted section 7 has been examined by the courts and the prerogatives of the corporation counsel of the City of Chicago have been uniformly sustained.

In the case of *The People ex rel v. Faherty* (1922), 306 Ill. 119, the Supreme Court of Illinois issued a writ of mandamus commanding the board of local improvements to revoke the appointment of an attorney of its own selection, and to recognize the power and right of the corporation counsel of the City of Chicago to attend to the law business of the board. The court in its opinion considered the statute authorizing the appointment of the corporation counsel, as well as the ordinance creating the office of corporation counsel, and on page 128 said:

"The act of 1905 (Article XII, Cities and Villages Act) made the corporation counsel the head of the law department. It abolished the office of city attorney, and the duties theretofore belonging to that office were conferred on the corporation counsel. It appears to have been the intention and purpose of the legislature that the law department of the city of Chicago with the corporation counsel as its head, should attend to all the law business of the city. The board of local improvements of the city, though not organized under the Cities and Villages Act, is an arm or agency of the municipal government, and all legal proceedings carried on by it in making local improvements are law business of the city. * * * The act of 1905 recognized the established law department of the city of Chicago and that the city had a corporation counsel. He was by the statute made head of that department, and was given power, under the ordinances, to appoint assistants and clerks to attend to the duties of the department of which he was the head. 'Law department' of a city or other government means a department having charge of the law business of the government. A city maintaining such a department cannot, as a general rule, hire or employ outside counsel to attend to the legal business of the city. (Citing cases.) It is true the statute in express terms did not prescribe the duties of the head of the law department, but we think it could not reasonably mean otherwise than that he was charged with the duty of superintending all the law business of the city. * * * To our minds the intention of the legislature in making the corporation counsel of the city of Chicago the head of the law department of the city, abolishing the office of city attorney and requiring the corporation counsel to perform the duties theretofore performed by the city attorney, was to combine in one department and under the direction of one responsible head the city's law business."

The holding in the *Faherty* cases has been followed in later cases. See *The People ex rel v. Board of Education* (1930), 258 Ill. App. 271, (1931) 345 Ill. 486; *Baltzer v. City of Chicago* (1931), 260 Ill. App. 384.

It will thus be seen that the duties which the ordinance under consideration places upon the City Council Legislative Reference Bureau in preparing ordinances, resolutions and orders proposed to be introduced in the city council, in affording legal assistance and information to members of the council, in drafting bills for introduction in the General Assembly on matters affecting the municipality, and in connection with the preparation and revision of the Municipal Code of Chicago and the revision of existing ordinances, are the same duties now being performed by the corporation counsel.

To create a new agency and place upon the proposed bureau and its director these same duties would doubtless result not only in duplication of service, but very probably bring about unseemly confusion and conflict. To thus encroach upon the rights and duties of the statutory head of the law department, to supersede him by a bureau created by the legislative branch of the government, a legislative bureau outside the law department, engaging its own personnel to perform legal services without the direction and control of the city's duly constituted and exclusive legal adviser, would we believe be economically unsound, engender conflict of authority, be destructive to the orderly functioning of municipal government, and repugnant to the established law. As we view the matter the city council has no more authority to supersede the corporation counsel by a bureau of its own creation than the corporation counsel has to impinge upon the rights and duties of the members of the city council by law department fiat.

At the expense of prolixity it may not be improper to point out that the practice of law is not an exact science. The preparation of municipal ordinances may not always be done over night, but on the contrary often entails intensive study, search for precedents, determination of basic powers, the application of tests as to workability, and correlation with other provisions of the municipal code. Hasty legislation is often bad legislation. What is best is not always readily discernible. Furthermore, the drafting of ordinances is not always susceptible of being centralized in one individual or group, or even in one division of the law department. So diversified are the modern day problems of great cities, that it has become necessary to develop specialists in different fields, such as public utilities, public improvements, construction of subways and superhighways, taxation, licensing and regulation of occupations, operation of airports, and many others. A general drafting bureau could hardly be expected to function adequately in all of these fields.

To say that because the state legislature has created the Illinois Legislative Reference Bureau, and charged it with the duty of affording members of the General Assembly legal assistance and information in the preparation of bills, resolutions, orders, amendments, etc., and that the bureau now proposed to be created by the instant ordinance is patterned after the state bureau, has little or no cogency to the question under consideration. The obvious answer is that in the case of the City of Chicago the legislature has seen fit to provide for the office of corporation counsel and to invest that official with the duty and the right to attend to all of the law business of the city, and we have already seen that the Supreme Court of Illinois has construed the act of the legislature and held that the corporation counsel is charged with the duty of superintending all of the law business of the city.

Likewise and for the same reason no support can be found for the proposed ordinance and bureau in the fact that the Congress of the United States has established an office known as the Office of Legislative Counsel, and vested that office with the duty of aiding committees of either house of Congress in the drafting of public bills, resolutions or amendments.

Unconvincing is the point made in argument on the floor of the council chambers, that a precedent controlling upon the instant matter has been established by the appointment of a Chicago architect to perform services as Director of Revision of the Chicago building code in connection with the revision of that code. Our understanding is that the engagement of the architect was not for the performance of legal services, but merely to furnish assistance in matters pertaining to buildings and other structures, technological matters.

Obviously, it was not the intention of the city council to create the bureau for the sole purpose of duplicating the functions of the Municipal

Reference Library in collecting municipal data. It seems certain that the council would not have passed the ordinance without imposing upon the bureau those duties respecting the furnishing of legal assistance to aldermen, the preparation of ordinances, resolutions and orders, and code revision. Hence, we do not believe a part of the ordinance may be sustained and the remainder held invalid. It follows that the ordinance must stand or fall in its entirety, and if invalid in part, must be regarded invalid in toto.

Based upon the statutory law and authorities herein cited, our opinion is that the ordinance in question is violative of the statute which makes the corporation counsel the head of the law department and holds him alone responsible for superintending all the law business of the city. Being repugnant to the statute, as the statute is interpreted by the Supreme Court, the conclusion is inescapable that the ordinance is void and the attempted establishment of the bureau illegal.

SCHOOL LEVY

(No. 10946—City Council—J. F. G.—February 27, 1947.)

The law making mandatory the levy of taxes by the City Council for school purposes has not been changed by the adoption of the School Code in 1945.

Citations:

Cases: 196 Ill. 353, 360.
231 Ill. 63, 69.

Other reference: School Code, Secs. 34-57, 34-59.
Coun. J. p. 7070. Jan. 23, 1947.

OPINION OF FOREGOING SYNOPSIS

At the meeting of the City Council of January 23, 1947 an order was passed on motion of Alderman Waller directing the Corporation Counsel to render an opinion to your Honorable Body as to the powers and duties of the City Council under existing statutes in reference to the annual tax levy for school purposes of the Board of Education of the City of Chicago (see Council Journal 7070).

When this order was presented for the consideration of the City Council, Alderman Waller indicated his belief that, by the adoption of the School Code in 1945, the law relating to the levy of taxes for school purposes had been revised so as to cast doubt upon the obligation of the City Council to levy taxes as required by the Board of Education.

Prior to the adoption of the School Code, Section 189½ of the School Law governed the tax levy of the Board of Education of the City of Chicago. The language employed to designate the taxing authorities for school purposes was, "the Board of education and the authorities of such district, village or city, as the case may be, *shall be authorized to levy annually*" is substantially the same as the language employed in Section 34-57 of the School Code which reads "the board of education and the authorities of such district or city, as the case may be, *may levy annually*." We are of the opinion that there is no distinction between the language of the old Act, "shall be authorized to levy", and the language in the School Code, "may levy."

Our opinion is fortified by the reenactment of the provision of Section 135 of the old School Law reading as follows: "And nothing herein contained shall be construed so as to authorize any such board of education to levy or collect any tax, but the city council of said city shall, upon the demand and under the direction of such board of education, annually levy all school taxes." That provision is found in Section 34-59 of the School Code and reads: "This Article does not authorize the board to levy or collect any tax, but the city council shall, upon the demand and under the direction of the board, annually levy all school taxes."

In levying taxes for school purposes, for many years past, the functions of the Board of Education and the City Council in cities constituting a school district have been clearly defined by the Supreme Court of Illinois.

In *Koelling v. People* (1902) 196 Ill. 353, at page 360 the court said: "The Board of Education of the city of Chicago certified to the city council the amount required for the establishment and support of schools * * *. It was then the duty of the city council to cause the same to be levied * * *. In the administration of the School law the city council performs the same functions as the school authorities in school districts generally * * *."

The foregoing case is cited with approval in *Gray v. Board of School Inspectors* (1907) 231 Ill. 63, on page 69, where it is said: "In cities of over one hundred thousand the board of education certifies to the city council the amount required for the establishment and support of schools, and then it is the duty of the city council to cause the same to be levied and collected in the same manner as the law provides for the levying and collecting of taxes for school purposes. (*Koelling v. People*, 196 Ill. 353.)"

The law which makes mandatory the levy of taxes by the City Council for school purposes, in accordance with the direction of the school board, has not been changed to this date.

AMOUNT DUE ON LICENSE FEE

(No. 10973—Chairman, Finance Committee—M. H. F.—June 20, 1947.)

If there is a valid controversy and the City's ability to collect the entire amount due on a license fee is doubtful, the City Council may authorize acceptance of a lesser amount in satisfaction of the entire indebtedness.

Citations:

Ordinance: Municipal Code, 101-14.

Cases:
 14 Ill. 193.
 157 Ill. 414.
 231 Ill. 478.
 244 Ill. 220, 230.
 287 Ill. 225.
 149 Ill. App. 152.
 150 Ill. App. 435.
 181 Ill. App. 388.

Reference: McQuillin Municipal Corps. 2nd Ed. Vol. 6, Sec. 2643.

OPINION OF FOREGOING SYNOPSIS

Your communication of June 20, 1947 transmits, (1) a letter addressed to Alderman Kells by the Chicago Stadium Corporation June 3, 1947, enclosing a copy of a letter addressed the same day to the Mayor and

setting forth the Stadium Corporation's position relative to unpaid license and inspection fees claimed to be due from that corporation, and (2) a copy of the minutes of the meeting held June 19, 1947 by your subcommittee presided over by Alderman Kells. You request our opinion relative to the power and authority of the City Council to put into effect the objectives expressed in a motion made by Alderman O'Hallaren, a copy of which motion is set forth in the minutes.

The motion referred to reads as follows:

"That we adhere to the agreement made (outlined in the letter to Mayor Kennelly and the members of the City Council) upon payment by the Chicago Stadium Corporation to the City of \$2,441.48 as a compromise settlement in full of all license and inspection fees now due or claimed to be due the City, upon the receiving of an opinion from the Corporation Counsel that the City Council had the authority to make such a compromise, and that further action be taken relative to fees due or to become due hereafter."

In connection with the matter considered by the subcommittee and which was the subject matter of Alderman O'Hallaren's motion we have this date received from the City Comptroller a copy of a letter dated June 20, 1947 addressed to Alderman Kells which discloses that the claims of the City are in three categories:

(1) License fees for the years 1941 to 1947, inclusive, at the rate of \$3,000.00 per annum for the years 1941 to 1943, inclusive, and at the rate of \$3,300.00 per annum for the years 1944 to 1947, inclusive.

(2) Compensation for the right to maintain canopies over the sidewalk for the year 1947, amounting to \$106.50.

(3) Various inspection fees for the years 1939 to 1947, inclusive, aggregating in amount \$4,632.83.

The Stadium Corporation has made application for a 1947 license and tendered therefor the sum of \$3,300.00, and has offered to pay the compensation for canopies for the year 1947 amounting to \$106.50, and to compromise the claims for inspection fees amounting to \$4,632.83 for \$2,334.98. In other words, the Stadium Corporation is willing to pay the 10th Class Amusement license fee for the year 1947 amounting to \$3,300.00 and to settle all other claims for \$2,441.48.

The Stadium Corporation's application for a 1947 Amusement license projects the question whether such license may properly issue until the corporation first discharges its indebtedness to the city. Section 101-14 of the Municipal Code of Chicago reads as follows:

"No license or permit shall be issued to any person indebted to the city, unless and until such person pays to the city all indebtedness then due from such person or by authority of the city council otherwise discharges all such indebtedness in accordance with the terms and conditions fixed by the city council."

In our opinion, which is based upon the present state of the law, it is questionable whether the City can recover the license fees, as such, for the past years, no licenses having been issued. The claim arising out of failure to procure licenses is therefore not an indebtedness within the meaning of Section 101-14, no penalty having been imposed upon the Stadium Corporation for operating a 10th Class amusement without a license.

As to the compensation for maintenance of canopies, the amount offered in settlement includes all such compensation due to the City, according to the information supplied us.

The only remaining indebtedness to the City, which may stand in the way of issuing a license, is for the various inspection fees.

In several adjudicated cases the courts have held that the City Council may settle doubtful or disputed claims, and that any settlement and compromise of a doubtful claim, made in good faith, binds the City. This right to compromise disputed claims is an incident to the customary power possessed by municipalities to sue and the liability to be sued. (5 R. D. C. 886.)

In *McQuillin on Municipal Corporations*, 2 Ed., Vol. 6, Section 2643, it is said:

"The capacity to contract and be contracted with, and to sue and be sued gives the implied power to settle disputed claims, controversies and matters in litigation."

In *City of Chicago v. P. C. C. & St. L. Ry. Co.* (1910), 244 Ill. 220, a case involving the release by the City of valid claims against a railroad company in consideration of the doing of things which the company could not be compelled to do and which the City deemed of equal or greater value to it than the enforcement of such claims, the court said (p. 230):

"Authorities of municipal corporations have no power to make donations to any individual or corporation, but the revenues are to be held for corporate purposes. (*Washingtonian Home v. City of Chicago*, 157 Ill. 414.) * * * In *Town of Petersburg v. Mappin*, 14 Ill. 193, it was held that although a municipal corporation cannot dispose of its property by way of gratuity, the town had power to settle and adjust claims, and a settlement of an existing controversy by the trustees, in good faith, bound the corporation. Again, in *Agnew v. Brall*, 124 Ill. 312, it was said that a city council has no power to squander or give away the funds or property of the corporation, but that it may settle doubtful and disputed claims, and any settlement and compromise of a doubtful claim, made in good faith, binds the city."

In *Brackett v. City of Morris* (1909), 149 Ill. App. 152, it was held to be peculiarly within the province and power of the City Council of a City to compromise litigation which affects the affairs of the City.

In *City of Spring Valley v. Franckey* (1909), 150 Ill. App. 435, the court held that a City Council has the power to enter into a valid compromise of pending litigation to which the City is a party.

Where, however, no real controversy exists in regard to the validity and binding effect of an indebtedness owed by a person who is solvent and responsible, the law is clear that the City Council has no power to discharge without payment a debt due the City. This would be tantamount to disposing of an asset or property of the municipal corporation without consideration and hence illegal. *Ludlow Valve Mfg. Co. v. City of Chicago* (1913), 181 Ill. App. 388.

In *People v. Parker* (1907), 231 Ill. 478, and *People v. Holden* (1919), 287 Ill. 225, the right was denied municipalities to compromise claims which were not doubtful, for less than the full amounts due.

The crux of the matter before us therefore appears to be whether or not there is a bona fide controversy existing between the City and the

Stadium Corporation over the inspection fees, and whether the City's claims for these fees may reasonably be considered as doubtful.

If the City Council has information to justify the conclusion that there is such a controversy and that the City's ability to collect the entire amount claimed is doubtful, the City Council may, in our opinion, authorize acceptance of a lesser amount than that claimed in satisfaction of the entire indebtedness.

If the City Council desires that the claim against the Chicago Stadium Corporation be compromised, we suggest the passage of an order instead of an informal motion.

FENCES ALONG RIVER

(No. 10978—Alderman, 47th Ward—S. R. D.—June 26, 1947.)

The City Council does not have the power to declare unfenced property along the Chicago River to be a nuisance.

Citations:

Statute:	IRS '45, Ch. 24, Par. 23-61.
Cases:	123 Ill. 348.
	260 Ill. 150.
	280 Ill. 576.
	317 Ill. 529, 533.
	139 Pac. 1018, 1034 (Kan.)
	145 Pac. 893 (Kan.)

OPINION OF FOREGOING SYNOPSIS

We acknowledge receipt of your letter of June 16, 1947, requesting an opinion as to whether or not the City Council is empowered to enact legislation declaring unfenced portions of private property abutting the banks of the Chicago River a public nuisance.

Section 23-61 of Article 23 of the Cities and Villages Act grants to the corporate authorities of a municipality the power to define, prevent, and abate nuisances (1945 Illinois Revised Statutes Chap. 24, Par. 23-61). However corporate authorities of a municipality have not the power to declare anything a nuisance which is not in fact a nuisance.

In *The People v. City of Chicago*, 280 Ill. 576 (1917), the court said (page 578):

"It is not claimed that the maintenance of such an establishment as the one contemplated would be a nuisance *per se* or that the statute specifically gives municipalities power to regulate the location of the same. The power given by law to incorporated cities and villages to declare what shall be a nuisance does not authorize a city or village to declare that a nuisance which is not such in fact. (*Village of DesPlaines v. Poyer*, 123 Ill. 348.) If a business is not in its nature a nuisance but may become one by reason of its locality, surroundings or the manner in which it is conducted, a city can declare it to be a nuisance only if it is one in fact. (*People v. City of Chicago*, 280 Ill. 150.)"

The best test for the question whether property upon the banks of a river without protection is in fact a nuisance is to determine whether under any circumstances the owner owes a duty to any person and can be held liable in case of injury for failure to perform that duty. Conditions and circumstances which may bar recovery by a person of discretion is not always the determining factor. Persons may be held liable to children of tender years although not liable to adults or persons of discretion. This is known in law as the doctrine of attractive nuisance.

Is the location of property upon the bank of a river without protection for children in itself an attractive nuisance?

In *Harper v. City of Topeka*, 51 L. R. A. (N. S.) 1032, 92 Kansas 11, 139 P. 1018, the court held that the city was not liable for the drowning of a child in a pond located in a public park, saying (page 1034) :

"The pond appears to be of like character, and, although made by the city, is virtually a reproduction of the ponds found in nature, and nature does not maintain attractive nuisances. That there always is possible danger of a child going upon the ice or falling into the water is true; but such an accident is as likely to occur on any like pond in nature. It has been said that there is possible danger in every step of life from the cradle to the grave, although the danger may not be foreseen. Every tree that stands in the park or in the city presents the possible danger that some boy may climb it and fall to his injury, or even death. Ordinary care requires only that means be taken to avoid such dangers as are reasonably to be apprehended,—probable dangers, not possible dangers. The imminence of the danger is ordinarily the measure of care to be taken to avoid it. There seems no reason in this case to hold the city liable which would not have been equally cogent had the boy, in going to or from school, gone through a neighbor's pasture, with the owner's consent, and met a like fate upon a pond therein. We know of no rule that imposes higher care upon a city than upon an individual."

In *Somerfield v. Land and Power Co.*, 93 Kan. 762, 145 Pac. 893, the court said:

"The canal, as will be observed, has the characteristics of a natural stream, and can no more be regarded as an attractive nuisance than would a river flowing through the city or a pond or lake therein. It has been held that an unprotected pool in a natural watercourse, to which boys resorted to wade and swim, could not be regarded as an attractive nuisance within the meaning of the 'turnstile' cases."

In *Mindeman v. Sanitary District*, 317 Ill. 529 (1925) a child of tender years, while playing on the banks of a canal owned by the Sanitary District, was drowned. The court stated that the question for decision was whether the canal of the Sanitary District is what has been called, for want of a better term, an attractive nuisance, and held (page 533) :

"Without extending this opinion further by quoting from the many authorities on the subject, it is sufficient to say that the courts seem to be of one mind in holding that a canal, a pond, or other open body of water on private property, is not of itself an attractive nuisance, as that term is used in describing an instrumentality which will render the owner liable for injuries to a child attracted to and injured by it."

It is clear that the abutting property owner cannot be held liable under the doctrine of attractive nuisance for failure to fence in property abutting a natural stream.

Therefore, we are of the opinion that the City Council has not the power to enact legislation declaring unfenced private property abutting the banks of the Chicago River a public nuisance.

DISABLED VETERANS PRIVILEGES

(No. 10979—Chairman, Sub-Committee on Parking—M. H. F.—June 28, 1947.)

A proposed ordinance exempting disabled veterans from parking regulations would be unconstitutional.

Citation: 349 Ill. 422.

Ordinance: Municipal Code, 27-19, 27-29, 27-30, 27-31.

OPINION OF FOREGOING SYNOPSIS

Your letter of June 25, 1947 requests our opinion as to the legality of an ordinance providing for the issuance of "War Disability" sticker emblems to veterans of World War I and World War II who have suffered the loss of one or both legs above the ankle, and further providing for exemption of such war veterans from certain of the regulations governing the parking of motor vehicles.

The proposed ordinance, copy of which you transmit, is designed to amend Chapter 27 (Traffic) of the Municipal Code of Chicago in the following particulars:

(1) By adding to subparagraph (13) of Section 27-19, which now provides that it shall be unlawful for the operator of a vehicle to stop, stand or park such vehicle at any place where official traffic signs have been erected prohibiting stopping, standing and parking, by adding thereto a statement to the effect that the provision shall not apply to any veteran who served in the armed forces of the United States in World Wars I or II and has suffered the loss, or loss of use, of one or both legs above the ankle, with regard to a motor vehicle of such veteran upon which is affixed a veteran's "War Disability" sticker.

(2) By adding to the first paragraph of Section 27-29, which section now restricts parking in the "Loop" district, a proviso stating that the restriction shall not apply to any of the veterans mentioned in (1).

(3) By adding to Section 27-30, which now prohibits parking upon any street where parking has been prohibited by order of the city council and parking signs have been erected, a proviso stating that where the parking is not a violation of Section 27-19, this section shall not apply to any veteran mentioned in (1).

(4) By adding to Section 27-31, which now prohibits parking upon any street where signs have been erected through order of the city council prohibiting parking for a longer time than indicated upon such signs, a proviso stating that where the parking is not a violation of Section 27-19, this section shall not apply to any of the veterans mentioned in (1).

(5) By adding to Section 29-7 of the Wheel Tax License ordinance, a provision under which the City Clerk will be authorized to deliver to any veteran mentioned in (1), at the time the veteran procures his City vehicle license, a prescribed type of sticker emblem bearing the words "War Disability," the year issued, etc.

It is noticed that the ordinance proposed confers special privileges upon disabled veterans of World Wars I and II, but not upon veterans of the Spanish-American War, or other wars or conflicts in which the United States has been employed, and as to which there doubtless are disabled veterans residing in Chicago who may operate motor vehicles. It is further noticed that only disabled persons who are veterans are placed in the preferred class.

We have recently had before us a question similar to the one you now propound, and in an opinion given June 7, 1947, to the Alderman of the 41st Ward, we were constrained to reach the conclusion that under the present state of the law as announced in the case of *Marallis v. City of Chicago* (1932), 349 Ill. 422, special parking privileges could not lawfully be conferred upon disabled war veterans. A copy of this opinion to the Alderman is enclosed herewith for your information and guidance.

In consonance with this previous opinion and the court's decision in the *Marallis* case, which holds that a soldier or sailor, after his discharge returns to civil life, becomes a part of the community in which he lives, and enjoys the same rights and is subject to the same burdens as other citizens similarly circumstanced, the conclusion is inescapable, and it is our opinion that the ordinance submitted and now under consideration by your committee would be violative of the due process of law and equal protection of the laws provisions of the Federal and State Constitutions, and hence illegal and void.

TENURE OF CITY OFFICERS

(No. 10981—Mayor—J. F. G.—July 10, 1947.)

All city officers appointed by the Mayor, with consent of the City Council, whose terms of office are not otherwise expressly provided for, shall hold their respective offices during the term of the fiscal year in which such appointments are made and until their successors are appointed and qualified, provided the terms of such officers shall not extend beyond the term of office of the Mayor.

Citations:

Statute: IRS '47, Ch. 24, Sec. 9-16.

Ordinance: Municipal Code 25-1.

OPINION OF FOREGOING SYNOPSIS

You have inquired if officers appointed by your predecessor are entitled to hold their respective offices and perform the functions thereof until their successors are appointed by you.

Section 9-16 of the "Revised Cities and Villages Act" provides that the City Council may fix the term of office of all officers appointed by the Mayor but the term of office shall not exceed that of the Mayor. If there is a failure to appoint a City officer or the person appointed fails to qualify, the person filling the office continues in office until his successor has been chosen and has qualified.

Pursuant to the power vested in the City Council by the foregoing provision the following section of the Municipal Code was adopted:

25-1. Term of appointees.) All officers appointed by the mayor, by and with the advice and consent of the city council, whose terms of office are not otherwise expressly provided for, shall hold their respective offices during the term of the fiscal year in which such appointments are made and until their successors are appointed and qualified. Provided that the terms of such officers shall not extend beyond the term of office of the mayor.

Section 25-1 applies to all of your cabinet officers. It does not apply to the following whose terms of office are fixed either by statute or ordinance:

Chicago Housing Authority	5 years
Chicago Park District	5 "
Chicago Plan Commission	4 "
Chicago Transit Board	7 "
Civil Service Commissioners	3 "
Board of Education	5 "
Board of Inspectors of House of Correction	3 "
Superintendent of House of Correction	4 "
Board of Directors of Chicago Public Library	3 "
License Appeal Commissioner	4 "
Board of Examiners of Mason Contractors	1 year
	expiring April 30
Medical Center Commissioner	5 years
Board of Directors of Municipal Tuberculosis Sanitarium	3 "
Redevelopment Commissioner	2 "
Zoning Board of Appeals	5 "
Director City Council Legislative Reference Bureau	4 "

The reason for fixing the fiscal year as the term of office of all other officers was to permit the City Council to fix their salaries in the annual appropriation ordinance without violating the principle that the salaries of officers shall not be increased or diminished during their respective terms of office.

While the law provides that the term of office fixed by the City Council shall not exceed that of the Mayor, the person holding office at the time the Mayor's term expires continues in office by right until his successor has been chosen and has qualified.

STEAM TRANSMISSION IN CHICAGO TUNNEL

(No. 10989—Alderman, 14th Ward—A. J. R.—August 19, 1947.)

Under the ordinance of July 19, 1932 the Chicago Tunnel Company may not use the tunnels for the transmission of steam. A further grant of authority and permission by the City would be necessary for that purpose.

Citations:

Case: 220 Ill. 444.

Other references: 18 Op. Corp. Coun. 630, 633.
19 Op. Corp. Coun. 273, 275.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your letter of August 13th requesting an opinion as to whether or not the Chicago Tunnel Company has the right to use for the transportation, transmission and propulsion of steam the tunnels now occupied by it under a lease from the city.

This department has heretofore rendered two opinions involving this question. The first was dated January 14, 1935 and appears in Volume XVIII of Opinions of the Corporation Counsel and Assistants at pages 630-633. The second was rendered on January 8, 1946 and appears in Volume XIX of Opinions at pages 273-275.

The rights of the Chicago Tunnel Company pertaining to the use of the tunnels are derived from the ordinance of July 19, 1932. By section 2 of that ordinance the city granted to the tunnel company "permission and authority * * * to establish, construct, reconstruct, maintain and operate a tunnel system for a term of thirty (30) years * * *." The scope of this grant is limited by the definition of the "tunnel system" for which the authority and permission were granted. That definition is contained in subdivision (e) of section 1 of the ordinance and is as follows:

"(e) The words 'tunnel system' mean all tunnels and extensions thereof and connections therewith to and upon private lands and buildings and all tracks, rolling stock, cars, carriers, pneumatic tubes, containers, electric motors, devices for the propulsion of cars, pipes, trolley lighting system and all other apparatus, equipment and appurtenances used or useful for the conveyance, transportation, transmission, receipt and delivery of all kinds of bulk freight, package and parcel freight, merchandise and mailable matter, and include the business of a common carrier through the tunnels (but not for the conveyance or transportation of passengers);"

The grant must be construed most strongly against the grantee and in favor of the public. It should be interpreted according to the language used and in the light of all the facts and circumstances surrounding the case. (*Blocki v. The People*, 220 Ill. 444.)

The opinion of January 14, 1935 sets forth at length the reasons for our conclusion, expressed in that opinion as follows:

"The City Council never intended to authorize the Chicago Tunnel Company to engage in the business of transmitting steam by private contract or as a common carrier or otherwise. This is emphasized by the language in section 10 of the ordinance authorizing the company to sublet or permit the use of space in the tunnels to other public service agencies for any public service subject to the consent of the City Council.

"The limitations under this ordinance upon the use of the tunnels for any purpose other than the transportation of bulk freight, package and parcel freight, merchandise and mailable matter are clearly expressed in the ordinance."

Whatever rights were granted to the tunnel company by the ordinance of July 19, 1932 may be exercised by the company without further consent by the city. Where further consent is required, the right has not been granted. By section 10 of the ordinance further consent by the city is required for the use of the tunnels by any lessee or permittee of the tunnel company for any public service other than the transportation, etc. of "all kinds of bulk freight, package and parcel freight, merchandise and mailable matter" and the business of a common carrier not engaged in

the transportation of passengers. By the ordinance the city granted its consent to one kind of use of the tunnels and stipulated that for other uses its separate consent would have to be obtained.

By accepting the ordinance and proceeding to carry on its operations in the tunnels, the tunnel company assumed certain obligations pertaining to service which it undertook to render. Obviously any use of the tunnels which by its character or extent might impair the service required by the terms of the ordinance cannot be engaged in without the further consent of the city, and no such consent has been given.

Our answer to your question therefore is that under the ordinance of July 19, 1932 the Chicago Tunnel Company may not use the tunnels for the transmission, transportation or propulsion of steam; a further grant of authority and permission by the city would be necessary for that purpose.

COST OF ADMINISTRATIVE HEARINGS

(No. 11010—Chairman, Finance Committee—J. F. G.—November 17, 1947.)

Without proper legislative authority the License Appeal Commission, the Zoning Board of Appeals, and the Temporary Community Housing Rent Commission may not charge or collect costs or fees for any service rendered, and the City Council has no authority to require such charges to be made.

Citations:

- | | |
|-----------|--|
| Statutes: | IRS '47, Ch. 24, 73-3. |
| | IRS '47, Ch. 43, Par. 152. |
| | IRS '47, Ch. 80, Par. 48. |
| | IRS '47, Ch. 111 $\frac{2}{3}$, Par. 7. |
| Case: | 286 Ill. 490, 494. |

OPINION OF FOREGOING SYNOPSIS

We have your letter of November 5, 1947 requesting our opinion as to whether the City has power to assess a fee or charge of any kind for hearings or other services in the performance of the functions of the License Appeal Commission and the Zoning Board of Appeals or either of them. Since receipt of your letter of November 5 a similar question was addressed to us by your letter of November 13 relating to hearings before the Temporary Community Housing Rent Commission or other services rendered by that commission.

Each of the commissions referred to was established or authorized by State law and their functions and powers are defined by the laws of their creation (License Appeal Commission, Chap. 43, Par. 152, Ill. Rev. Stat. 1947; Zoning Board of Appeals, Sec. 73-3 Revised Cities and Villages Act; Rent Control Commission, Chap. 80, p. 48, Ill. Rev. Stat. 1947). We have examined each of the acts referred to and have found no explicit power for any of the bodies referred to to exact a fee or charge costs for the performance of the duties imposed upon them. When an administra-

tive commission or board is created or authorized by statute for the purpose of affording to a person aggrieved by the application of an ordinance or regulation or by any order or action of an officer, the person so aggrieved is entitled to a hearing as a matter of right and that right may not be abridged by the imposition of costs or fees or by any other means unless expressly authorized by statute.

In *Kennedy v. Public Utilities Commission*, 286 Ill. 490, our Supreme Court considered whether the Public Utilities Commission could refuse to prepare and file a transcript of the proceedings before the commission for use on appeal to the Circuit Court for review of the commission's order and decision without payment of the reasonable cost thereof. The court said (pp. 493-494):

"Fees for the performance of any duty imposed upon a public officer are only authorized where specifically provided for and fixed by statute, * * * The purpose of the act, as declared in the title, is regulation of public utilities, and the whole object of the act is to secure to the public proper and efficient service by public utilities at uniform and reasonable rates. * * * The act authorizes a complaint by any person that the rate charged for service is unjust and unreasonable. * * * It ought not to be presumed that the General Assembly intended to add to the necessary burden and expense the payment of a substantial sum of money as fees to the commission for the privilege of having a judicial determination whether its order is lawful or reasonable."

Since the decision of the Supreme Court in the *Kennedy* case the General Assembly provided that the Illinois Commerce Commission, successor to the Public Utilities Commission, shall charge and collect fees for copies of papers and records and certified copies of evidence and proceedings before the commission (Chap. 111½, par. 7, Ill. Rev. Stat. 1947). It is obvious that without proper legislative authority the License Appeal Commission, the Zoning Board of Appeals and the Temporary Community Housing Rent Commission may not charge or collect costs or fees for any service rendered and that the City Council has no authority to require such charges to be made.

FIXING SALARIES

(No. 11092—C. H. L.—December 14, 1948.)

The City Council in fixing salaries may not use its power as a subterfuge to evade the Civil Service Law and regulations which afford equal opportunity for promotion of civil service employees by giving recognition to efficiency ascertained merit and seniority.

Citation:

Statute: IRS '47, ch. 24, sec. 9-99.

Reference: 18 Op. Corp. Coun. 169.

OPINION OF FOREGOING SYNOPSIS

We have your letters of October 11, 1948 and December 9, 1948, in the first of which you refer to an opinion of the Corporation Counsel dated August 17, 1932 and in the last to an opinion rendered August 17, 1943.

We cannot find any opinion rendered on August 17, 1943 pertaining to the subject you refer to, but the opinion of August 17, 1932 we find was our opinion No. 7719 addressed to the Commissioner of Public Works in re: Status of Laboratory Engineering Assistants (Op. Corp. Counsel Vol. XVIII, pg. 169).

That opinion has never been reversed by this department, and the general principle of that opinion relating to the exclusive right and power of the City Council to fix salaries of all officers and employees is supported by Sec. 9-99 of the Revised Cities and Villages Act.

However, the City Council in fixing salaries may not use its power as a subterfuge to evade the Civil Service Law and the rules and regulations which afford equal opportunity for promotion of civil service employees by giving recognition to efficiency, ascertained merit and seniority; that is to say the City Council by appropriating a higher salary for a position inferior in rank than for one which is superior in the same line of service would arbitrarily promote an employee over his superior without a promotional examination in violation of the Civil Service Law (See Op. Corp. Counsel, June 25, 1943 to the President of the Civil Service Commission).

B. POLICE DEPARTMENT

RETURN OF PROPERTY IN CRIMINAL CASE

(No. 10771—Commissioner of Police—A. A. P.—April 6, 1944.)

After the Municipal Court enters a final order in a case it loses jurisdiction and may not later issue an order directing the police department to return the property of the defendant.

Citations:

Constitution: Art. 6, sec. 29, Illinois Const. of 1870.

Cases:	33 Ill. 443.	277 Ill. 408, 411.
	193 Ill. 635.	285 Ill. 141.
	249 Ill. 456.	248 Ill. App. 220.
	273 Ill. 546.	257 Ill. App. 179.
	276 Ill. 327.	

OPINION OF FOREGOING SYNOPSIS

We have your letter of March 6, 1944 in which you state that the First District station has requested an opinion on an order purporting to have been entered by the Honorable Gibson E. Gorman, one of the Judges of the Municipal Court of Chicago.

The files of the Municipal Court in case No. 44-30816 consisting of complaint and the clerk's record known as the half-sheet show that leave was granted to file information and that the court took jurisdiction of the defendant in court on information filed. Following that entry there appears this order:

"Motion Defendant to suppress the evidence entered and sustained and defendant discharged."

The above order which was entered March 6, 1944 is a final order and insofar as the matters pending before the court are concerned the entry of that order terminated the same and the court divested itself of jurisdiction of the defendant and the subject matter.

Thereafter the defendant presented to the court a draft order, a copy of which you enclosed in your communication, which is in words and figures as follows to-wit:

"This cause coming on to be heard upon the information filed herein and written motion to quash information, to suppress certain evidence and for the return of 9 receptacles, and approximately \$500.00 in cash taken from the custody of defendant said motion having been duly verified by defendant, and the parties hereto being represented by their respective counsel of record, and the Court having considered evidence of the respective parties, and the arguments of counsel, said motion having been filed in writing and duly verified by defendant, and having been presented at the outset of the proceedings herein and before the taking of any evidence, and the Court being fully advised in the premises, finds the facts to be substantially as set out in the verified motion herein, and it is the ORDER OF THIS COURT that the City of Chicago, thru its police department shall return at once and that the People of the State of Illinois through their constituted officers and agents shall return to the defendant, Robert Weis, at the premises at 130 North Wells St., Chicago, Illinois, 9 receptacles, more fully described in the information and the verified motion of the defendant, and approximately \$500.00 in currency, and all other property by the police removed from the custody of the defendant, Robert Weis, unlawfully without search warrant, or without a warrant or process of law, and the Court finds the fact to be that said search and seizure and arrest were unlawful and without search warrant or warrant of law IT IS FURTHER ORDERED that all of said evidence herein before referred to so obtained by the police officers, be and the same is hereby suppressed as prayed in defendant's written verified motion. It is FURTHER ORDERED that the information herein be and the same is hereby quashed and the defendant is discharged accordingly."

The court was without jurisdiction to enter the draft order.

In the case of *People v. Turney*, 273 Ill. 546 the court held that:

"A criminal court loses jurisdiction upon the entry of a valid final order."

The case above cited arose out of a Petition for Writ of Mandamus to compel Judge Turney to expunge from the record an order vacating a judgment and sentence. In awarding the writ the Supreme Court said:

"When the court has done these acts (the entry of the final order) it would seem to have done all that it had legal power to do, and its power over the prisoner or his destiny, under the proceedings then before it, would appear to be at an end."

The case of *People v. Turney* was cited with approval in the case of *People v. Whitman*, 277 Ill. 408. The court in the *Whitman* case said (page 411):

"As to the second point, in the case of *People v. Turney*, 273 Ill. 546, the identical question was raised, and it was held that in criminal cases the general rule that a court may vacate its judgment during the term applies only while the judgment remains unexecuted, but it has no power to so vacate after the defendant has been sentenced and committed to the custody of the proper officer of the penitentiary or reformatory, as the defendant has then entered upon the execution of his sentence and the court has lost jurisdiction of his person.

"It is contended by counsel for the petitioner that the municipal court, under section 21 of the Municipal Court act, (Hurd's Stat. 1916 p. 824,) has absolute control over its judgments for a period of thirty days after their entry. But that section contains the following language: 'Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court.' From this language it seems clear that the municipal court has at least no more power than the circuit, superior and criminal courts of Cook county as to setting aside their respective judgments, and if such courts have no power to set aside a judgment and conviction and grant a new trial after the prisoner has entered upon serving his sentence the municipal court cannot do so. This must necessarily be true because of the provisions of section 29 of article 6 of the constitution of 1870, that 'all laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform.' Moreover, in *Grubb v. Milan*, 249 Ill. 456, this section of the Municipal Court act was construed, and it was there said, on page 461 of the opinion, after quoting the above provision: 'The municipal court has the same power over its judgments for a period of thirty days as circuit courts have during the term at which the judgment is entered, and parties have the same right.'"

The principles of law laid down in the case above quoted were followed in the case of *People v. LaBuy*, 285 Ill. 141, 248 Ill. App. 220 and 257 App. 179.

In the case of *People of the State of Illinois v. Weis* wherein the purported order was entered the court, by entering a valid final order which has not been modified, vacated or appealed from has terminated all controversy between the parties involved and under the holding in the above cited cases the judgment of the court is final and cannot be disturbed except as above indicated. Any subsequent order entered, without following the steps required by law, is a nullity and may be disregarded.

The devices taken by the police officers from the premises at 130 North Wells Street are gambling devices and no one can claim a right of property in them.

In the case of *People v. Frost*, 193 Ill. 635 the court held:

"The legislature have determined that gambling implements and apparatus are pernicious and dangerous to the public welfare and the keeping of them is an offense prohibited by law. They are, therefore, not lawful property which the law protects but have ceased to be regarded or treated as property and are liable to seizure, forfeiture and destruction without violating any constitutional provisions."

A ten page affidavit filed by the defendant when the case was called for trial in support of the motion to suppress designates the paraphernalia taken by the police as receptacles. The mere change of the name does not make gambling devices lawful property and the placing of a sign on the wall to the effect that the proceeds from these devices will be used in carrying out a laudible project which the organization has undertaken neither sanctifies such action nor legalizes the instruments. This is so whether the person displaying or using the same is a natural person or a corporation and whether the corporation is one for profit or for eleemosynary purposes.

Anderson v. City of Highland Park, 276 Ill. 327 where the court said:
"Corporations and individuals shall be required to conform to the

same standards of morals."

If it is a crime for an individual to possess slot machines it is likewise a crime for a corporation.

The legislature in enacting the statute under which the defendant was charged intended to prevent the destructive vice of gambling and to protect the public morals.

People v. Gibbons, 33 Ill. 443 where the court said:

"The object of the statute was to prevent the destructive vice of gambling and while we adhere to the well established rule that a penal statute cannot be extended by construction we are not unmindful of the true intent and meaning of the legislature. The statute should receive such a construction as when practically applied will tend to suppress the evil prohibited."

Since this matter was referred to this office for an opinion a civil action has been commenced in the Municipal Court of Chicago which is still pending and undetermined. When the civil cause is heard the question will be fully adjudicated and the decision in that case should guide future action.

It is our opinion that the draft order, signed by the court after a final order had been entered disposing of the subject matter, is no part of the record in the case of *People v. Weis*, Mun. Court No. 44-30816 and is of no effect; first, because at the time of the signing of the same the court had divested itself of jurisdiction; second, because the order is not directed to any individual but is directed to "the City of Chicago * * * and the People of the State of Illinois * * *."

It is further our opinion that the second floor of the premises numbered 130 North Wells Street being licensed to sell alcoholic liquor at retail is subject to inspection by police officers.

The Statute makes possession of slot machines a criminal offense and it is our opinion that police officers may enter any premises without search warrant if they know that the occupant of the premises has in his possession slot machines.

POLICE RECORDS

(No. 10856—Commissioner of Police—E. J. B.—August 22, 1945.)

Records kept by the police department are open to inspection only to the Mayor and members of the City Council.

Citations:

Ordinance: Municipal Code 11-4.

Other reference: 19 Op. Corp. Coun. 19.

This will acknowledge receipt of your letter of July 13, 1945 relative to a communication from J. E. Ragen, Warden Illinois State Penitentiary, Joliet Branch and one from an inmate of said institution.

It appears from the above mentioned communication that the inmate committed a felony in Wheaton, Illinois in 1930 and was arrested without warrant in Chicago, Illinois, shortly thereafter. The inmate was returned to Wheaton where he was tried, convicted and sentenced by the proper authorities. It appears further that the inmate is now requesting the Chicago Police Department to furnish him a certified copy of his arrest slip, a certified copy of the warrant and a certified statement showing where he was held while in the custody of the Chicago Police Department. The inmate, through the Warden at the penitentiary, enclosed a check for the sum of two dollars to defray expenses for issuing requested documents.

The Municipal Code of the City of Chicago as passed by the City Council on August 30, 1939, chap. 11-4 provides as follows:

"The commissioner of police shall cause the following books of record to be kept in the department of police; persons arrested; time lost by patrolmen; accounts of monies received and expended and the purposes thereof; all properties placed in his charge; and such other books and records as shall be required by the business of the department.

"The Commissioner shall also cause a complete record of all felonies committed within the city to be kept. This record shall be open at all times to the mayor and members of the city council. It shall be classified by means of an appropriate index card alphabetically arranged as to the nature of the felonies committed, and by police districts and streets and numbers.

"A complete history of each person charged with having committed a felony shall be kept which shall include a record of all orders entered in the proceedings and the final disposition thereof by the coroner, the coroner's jury, the grand jury, or the court."

You will please note from above section of the code that you are to keep records of all felonies committed within the City of Chicago and that records so kept by you shall be kept open only to the Mayor and members of the city council.

We refer you further to an opinion rendered by this office on October 8, 1937 and recorded on p. 19, vol. 19 of the Opinions of the Corporation Counsel and Assistants.

Although in above opinion information was sought by a third person, we are still of the opinion that records kept by you are open to inspection only to the Mayor and members of the city council and you have no

authority advise other persons of such records because the city council by ordinance restricted access to the criminal records of the city and information contained therein.

ALIEN PROPERTY

(No. 10881—Commissioner of Police—A. A. P.—January 4, 1946.)

The Police Department of the City of Chicago acts as the agent of the executive department of the United States in taking custody of an alien owned camera. No claim can be made against the city for the loss of such property by the Police Department.

Citations:	44 Fed. Supp. 520.	29 W. Va. 326.
	249 Fed. 625.	188 N. W. 896.
	256 Ill. 558, 562, 563.	135 Pac. 871.
	196 Ill. App. 195.	223 Pac. 354.
	122 Mass. 344, 345.	

OPINION OF FOREGOING SYNOPSIS

You have requested our opinion in connection with a claim presented on behalf of one Rudolph Alt for the value of a LEICA MODEL 111A CAMERA WITH A 35 MM ELMAR F:35Y ANGLE LENS AND AN EVEREADY CASE. Mr. Alt has a receipt showing that on January 4, 1942 he turned over to police officers of the 6th District the camera in question in compliance with presidential proclamations issued December 7th and 8th, 1941 and January 14th, 1942.

Mr. Alt subsequently became a citizen of the United States and thereafter presented his receipt to the United States Marshal and requested return of his camera. The Marshal's office advised him that no such article had been received from the Police Department and supplied him with a form of notice of claim to be filed with the Marshal. He was informed further that no funds are available for the payment of such claims.

Having failed to obtain the camera he made inquiry about the article at the 6th District of the Police Department regarding the same and learned that the camera could not be found.

It is a well established rule of law that a municipal government has a double function. First the private proprietary function and, second, the governmental function. The intermingling of the two functions has resulted in difficulty in determining the boundary line separating the two. It is, however, clearly established that a municipality when exercising its private or corporate powers is liable to respond in damages for the negligence of its officers, agents or employees. This principle of law is clearly stated in the following cases:

Bradly v. Oskaloosa, 188 Northwestern^o 896, *Shawnee v. Roush*, 223 Pacific 354 and *Pacific Paper Company v. Portland*, 135 Pacific 871.

It is also clearly established that when a municipality is performing a government function it stands as the State and, therefore, cannot be held responsible for the negligence of its officers, agents and employees.

The case of *Hill v. Boston*, 122 Mass. 344 is a leading case on the question of non-liability of municipalities when performing a governmental function.

In passing on the question the Massachusetts Supreme Court said in part (page 345):

"We had supposed it to be well settled in this commonwealth that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage."

The principle exempting a municipal corporation for private action from Torts resulting from the performance of its governmental function has been steadily adhered to by the most recent decisions, is based on the reason that the undertaking is not to promote the private interests of a municipality as a corporate entity, but rather for the public benefit, and in the performance of such obligation the municipality is a mere public agent, either of the State or the nation. This principle of law is followed in the cases of *Jenings v. Peoria County*, 196 Ill. App. 195 and *People v. Chicago*, 256 Ill. 558. In discussing this principle of law the Supreme Court said (in part):

"The city of Chicago is a municipal corporation organized under the authority of the State for the purpose of local government subsidiary to the State. The corporation proper embraces both the territory and its inhabitants. It acts in a two-fold capacity and exercises two kinds of power,—one governmental and the other private. In its governmental capacity it is the agent of the State, and assists in the government of the territory incorporated by making laws and regulations with respect to its local and internal concerns. In its private capacity it represents those proprietary interests that appertain to it in common with other corporations. It makes contracts, employs men, owns property and transacts business in the same way as individuals and private corporations. In this capacity it may sue and be sued, and is governed by the same laws and rules and subject to the same regulations and limitations that natural persons are, except so far as it may be exempt by express enactment. (*Gale v. Village of Kalamazoo*, 1 Mich N. P. 5; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326; 6 Am. St. Rep. 644.) It is this dual relation which municipalities bear to the sovereign power that confuses the mind and gives rise to the difficulties encountered in fixing the responsibility for acts performed and unperformed. 'When power conferred has relation to public purposes and for the public good it is to be classified as governmental in its nature and appertains to the corporation in its political capacity, but when it relates to the accomplishment of private purposes, in which the public is only indirectly concerned, it is private, in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for non-user or mis-user, while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation.' " (256 Ill. 558 at 562-3.)

The loss sustained by the claimant occurred while the Police Department was acting for and in behalf of the executive department of the United States Government during a period of great stress and danger. The proclamations issued by the President were made for the safety of the

nation and the people. The validity of the acts authorizing the President to issue proclamations have been upheld in numerous decisions.

See *DeLacey v. United States*, 249 Federal 625. *Ex Parte Ventura*, D. C. Wash. 1942. 44 F. Supp. 520.

After careful examination of the law applicable to the subject matter it is our opinion that in the collection of certain articles mentioned in the presidential proclamations and the regulations of the Department of Justice the Police Department of the City of Chicago was acting as the agent of the executive department of the United States Government in the performance of a governmental function and for the security of the nation and the people of the United States and consequently no claim can be made against the City of Chicago for the loss of claimant's property, but the claimant may sue the officer or officers in custody of the camera at the time of its loss.

AGE OF TEMPORARY POLICEMEN

(No. 10888—F. V. M.—February 5, 1946.)

The State legislature may not pass laws prohibiting the Commissioner of Police from designating an age limit for patrolmen to be appointed to the force for temporary service until examinations can be held.

Citations:

Statute: IRS '45, ch. 24½, par. 48.

Case: Superior Court Case No. 45-S-24263.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of January 23, 1946, referring to the increase in the number of uniformed police of Chicago by the appointment of war veterans to these positions. You state that news reports indicate that the Civil Service Commission or the Police Commissioner has established an age limit for veterans seeking these positions, and that this is a violation of the Connors Act (S.B. 571) recently passed by the legislature.

Upon investigation we find that the Commissioner of Police has established a rule that all men who are to be appointed to fill the additional positions of patrolmen recently established by the City Council must not have reached their 28th birthday as of December 7, 1941.

As these are temporary appointments they are not governed by the provisions of the Cities Civil Service Act and are subject only to the approval of the Civil Service Commission.

The Civil Service Act reads in part as follows:

"* * * To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made. As amended by act approved July 14, 1939, L. 1939, p. 448. * * *" (Ill. Rev. Stat. 1945, Chap. 24½, Par. 48, p. 767.)

However, as to the Connors Act (S.B. 571) in a letter to the Civil Service Commission, under date of September 11, 1945, we expressed the following opinion:

" * * * Senate Bill No. 571 goes far beyond sound principles governing preferential consideration for civil service employment. It abolishes all age limitation for such employment and thereby imposes an obligation upon municipalities to put veterans upon their payrolls as virtual pensioners without previous service to the municipalities. We seriously question the constitutionality of such legislation. Sections 9 and 10 of Article IX of the State constitution prohibit the legislature from imposing any burden upon municipalities or their inhabitants which may involve the expenditure of money raised by taxation for corporate purposes without the consent of the corporate authorities of the municipalities."

In the case of *People of the State of Illinois ex rel. Frank R. Jendrick v. James P. Allman, et al.*, No. 45-S-24263, Superior Court of Cook County, which is now pending, the question of the constitutionality of this amendment to the Cities Civil Service Act will come before the court for a decision.

COIN MACHINE GAMES

(No. 10889—Commissioner of Police—M. H. F.—February 11, 1946.)

The "All Star Hockey Game", a coin operated machine falls within the definition of bagatelle and pigeonhole and may not be licensed under the "Automatic Amusement Machines Ordinance".

Citations:

Ordinance: Municipal Code, 104-32.7, 104-32.11, 193-26.
Coun. J. 1945, pp. 4577-4578.

Cases: 296 Ill. App. 645.
297 Ill. App. 130.
299 Ill. App. 117.
316 Ill. App. (6).

OPINION OF FOREGOING SYNOPSIS

Your communication of February 7, 1946 transmits a copy of a report made by the Commanding Officer of the Sixteenth District relative to an automatic amusement machine known as "All Star Hockey Game", and you request our opinion as to the proper classification of the device.

The description of the machine, as set forth in the Commanding Officer's report is as follows:

"On stand 4 ft. long 3 ft. high 2 ft. wide; glass enclosure on top 2 feet wide which has numerals on it which registers players score. In glass enclosure there are two metal men with Hockey Sticks also of metal one on each side of glass enclosure blocking a hole known as a goal. When a coin is inserted in slot and pushed in a iron ball rolls out and may be struck by player on either side who try to hit ball in hole or goal. These two men are operated by a handle on front

of machine. When handle is turned to right it operates man at top which causes him to swing hockey stick to try and strike iron ball and when turned to left the play on bottom swings around trying to strike ball. When ball is struck by either player and goes in hole or goal as it is known it counts a score. When ten balls are used up it constitutes a game."

Section 193-26 of the Municipal Code of Chicago prohibits the keeping or use in any place of public resort within the city any table or implement for any game of bagatelle or pigeonhole. The section reads as follows:

"193-26. It shall be unlawful for any person to keep or use in any place of public resort within the city any tables or implements for any game of bagatelle or pigeonhole.

The term 'bagatelle or pigeonhole', as used in this section, shall mean a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect, or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or pigeonhole commonly known as pin games.

The term 'place of public resort', as used in this section, shall mean any premises wherein any service or merchandise is offered for sale to the public or where tables or implements for playing the game of bagatelle or pigeonhole are kept for gain or profit, or any premises used as a clubhouse or clubroom.

It is hereby made the duty of every policeman to seize any table or implement kept or used in violation of this section and, upon conviction of the keeper thereof, such table or implement so seized shall be destroyed. Any person obstructing or resisting any policeman in the performance of any act authorized by this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.

Any person who shall violate the provisions of this section shall be fined not less than ten dollars nor more than two hundred dollars for each offense, and each day that the violation continues shall be regarded as constituting a distinct and separate offense."

Relying upon the description of the "All Star Hockey Game," and taking into consideration the stated fact that it is a game played with a ball upon a stand, board or playing surface, octagonal in shape, having goals and other holes into which the ball drops, and having arches and objects in the form of the metal players and their hockey sticks, also rubber sideboard bumpers, which control, deflect, or impede the direction or speed of the ball which is put in motion by the player when depositing the coin in the coin slot, and the machine may be regarded as a modern variety of bagatelle- or pigeonhole game, our opinion is that the device comes within the prohibition of the above quoted section.

Falling within the definition of bagatelle and pigeonhole it follows that the device may not properly be licensed under the Automatic Amusement Machines ordinance, Sections 104-32.7 to 104-32.11, Chapter 104 of the Municipal Code of Chicago, as amended December 8, 1945 (Coun. J. pages 4577-4578.)

While, strictly speaking there may be no pins to control, deflect or impede the direction or speed of the ball, obviously there are pins in the

sense of the metal players and their hockey sticks which serve the same purpose. In the rather extensive litigation over bagatelle and pigeonhole devices which was had a few years ago, both the Supreme and the Appellate Courts of Illinois, held as coming within the prohibition of the ordinance devices very similar to the "All Star Hockey Game", which devices were not equipped with pins in the literal meaning of that term. *Silfen v. City of Chicago* (1939), 299 Ill. App. 117; Appeal to Supreme Court denied 299 Ill. App. XVIII; *Coleman v. City of Chicago* (1938), 297 Ill. App. 130; *Levins v. City of Chicago* (1938), 296 Ill. App. 645. See also *People v. One Pinball Machine* (1942), 316 Ill. App. 161.)

DESTROYING FINGERPRINTS

(No. 10897—Commissioner of Police—A. A. P.—April 25, 1946.)

The Commissioner of Police does not have the power to remove, destroy, mutilate, or cancel the record of arrest and finger prints of a person arrested for obtaining property by false pretenses.

Citations:

Case: 196 Mich. 423, 428.

Other References: 20 Op. Corp. Coun. 25. (No. 9901.)

OPINION OF FOREGOING SYNOPSIS

We have your letter of recent date requesting our opinion regarding the position the police department should take in connection with a demand made for the removal and destruction of certain fingerprints from the records of the department. The demand is made on behalf of a person who was charged with violation of Chapter 193-1 of the Municipal Code of Chicago. The photostatic copy of the Municipal Court record, known as the half sheet, in case No. 45-MC-106603, which is attached to your request, shows that on June 14, 1945 leave was granted to Robert Fitzgerald to file a complaint against the defendant. The record further shows that on the 21st day of June, 1945, bench trial was had and the defendant was found guilty and fined \$50.00 and court costs taxed at \$10.00 for violation of the ordinance above referred to by Honorable Edward P. Luczak, one of the judges of the Municipal Court.

The record further shows that on June 27, 1945 the following order was entered "Motion of defendant heretofore entered herein to vacate judgment of June 21, 1945 sustained. Defendant waives jury trial. Trial by court finding defendant not guilty. Judgment on finding for defendant and discharged." On the right hand margin of the same photostatic copy appears the following entry: "Fine paid." Immediately under the last quoted entry there appears the following: "Judgment for F. & C. satisfied by payment of \$60.00 to clerk this June 21, 1945, day of C. Lapski, Deputy Clerk."

Chief Identification Inspector Evans who transmitted to your office the demand made on him for the destruction as aforesaid quotes the last paragraph of an opinion from this office, addressed to former Commissioner James P. Allman, October 22, 1938 which quotation is as follows: "In view of the above it is our opinion that you do not have authority to

remove, mutilate, destroy, cancel or obliterate any record of the arrest of * * * on the aforementioned charge of obtaining property by false pretenses." The opinion to which Inspector Evans has referred to is based on a long line of authorities in many jurisdictions in the United States. The courts of the State of Michigan, New Jersey, New York and many other jurisdictions have consistently held that the commissioner of police is not authorized to in any manner alter the records of the police department. The fact that the court saw fit to discharge the defendant after the judgment had been satisfied does not change the situation. Even if the defendant had been found not guilty in the first instance, the police department could not be compelled to alter or destroy its records.

In the case of *Miller v. Gillespie*, 196 Michigan 423, the defendant who had been found not guilty of the charge of embezzlement sought to have the records of the police department surrendered and cancelled. The court in denying the relief sought, said (p. 428):

"The opinions in some of the cases I have cited exhaustively review the subject. None of them is authority for granting relief in the case at bar, unless it can be said that the mere preservation in the files of the police department of a report purported to be made in the first instance—a true report—exposes plaintiff to ridicule, obloquy or disgrace. I am of the opinion that it does not, and without denying the jurisdiction of a court of equity to afford a remedy for a wrongful invasion of privacy, and I conclude that the plaintiff is not entitled to the relief asked for, and that the decree must be affirmed without cost."

In view of the authorities above referred to and our previous opinion we hold that you do not have authority to remove, mutilate, destroy, surrender, alter, cancel or obliterate the record of the arrest of the defendant on the charge of the violation of Chapter 193-1 of the Municipal Code of Chicago.

USE OF WORD "MILITARY"

(No. 10898—Commissioner of Police—F. V. M.—May 6, 1946.)

Use of the word "Military" in a company name is expressly prohibited by State Statute.

Statute: IRS '45, Ch. 96, Pars. 9-10.

OPINION OF FOREGOING SYNOPSIS

We have your communication of April 11, 1946 in which you quote a letter received from Ignatz Spitz, Attorney at Law, 139 N. Clark street, as follows:

"Associated Military Stores, Inc., 19 W. Jackson Blvd. A person came into above office and stated by virtue of the law we were prohibited from using the term 'military' as part of our corporate name. This statement apparently is predicated upon the following statutes: Chap. 96, Par. 9-10—Illinois Revised Statutes:

'An Act prohibiting the use of the word "Army", "Navy" and other names denoting the branches of the United States Government or certain other expressions in the name of a mercantile establishment.

'Section 1. It is unlawful for any person, etc.'

"Associated Military Stores, Inc. was incorporated as United Military Stores, Inc. in December, 1927 and on May 12, 1941 its certificate of amendment was issued by the Secretary of State changing its name to Associated Military Stores, Inc. My client manufactures custom made to measure officers uniforms for officers in all branches of the service from materials they obtain from the mills, and do not engage in the buying and selling of equipment or materials of the United States government, nor do we import or imply that the products which we make are or were made by the U. S. government or in accordance with government specifications or requirements or of government materials or that such products had been disposed of by the United States government as surplus or rejected stock.

"It is obvious that the intent of the law was to prevent the imposition by so-called army and navy stores who purchased surplus or rejected stock from misrepresenting the connection of their business with a governmental department or with the army, navy, etc. My concern is no different than a custom tailor who makes clothes to measure, and I am at a loss to understand where this statute is intended to restrict the use of the term 'military' in our corporate name 'Associated Military Stores, Inc.'

"I am of the further opinion this law has no application to my concern inasmuch as our license to use the name is by virtue of a state charter issued by the Secretary of State, and the statute is not interpreted retroactively but rather prospectively.

"If there is any date or further information we can supply, the same will be promptly furnished. I trust I may be favored with your opinion in the matter at your earliest convenience."
We quote paragraphs 9-10, chapter 96 I.R.S. 1945:

9. "Mercantile establishments—Use of words 'Army,' 'Navy,' etc. forbidden. Sec. 1. It is unlawful for any person, concern, firm or corporation to use in the name, or description of the name, of any privately operated mercantile establishment which may or may not be engaged principally in the buying and selling of equipment or materials of the Government of the United States or any of its departments, agencies or military services, the terms 'Army', 'Navy', 'Marine', 'Coast Guard', 'Government', 'GI', 'PX', or any terms denoting a branch of the government either independently or in connection or conjunction with any other word or words, letter or insignia which import or imply that the products so described are or were made for the United States government or in accordance with government specifications or requirements, or of government materials, or that such products have been disposed of by the United States government as surplus or rejected stock."

10. "Violation—Punishment.) Sec. 2. Any person, concern, firm or corporation violating the provisions of this act is guilty of a misdemeanor and shall be fined not less than \$25.00 nor more than \$500 for the first conviction, and not less than \$500 or more than \$1000 for each subsequent conviction."

The word "Military" is synonymous with the word "Army" as for example: "Military or Naval Institution"; "Military and Navy Personnel";

"Military and Naval Service". In fact the words "Army" and "Military" by usage have become so interchangeable as to denote the same thing.

Regardless of the type of business that Associated Military Stores, Inc. is engaged in, the manufacture of uniforms from materials purchased by it from the mills, the use of the word "Military" in the name of the company carries the same implication as the use of the word "Army", namely that the company is engaged in selling goods "made for the United States government" or "that such products had been disposed of by the United States government as surplus or rejected stock."

We are, therefore, of the opinion that the use of the word "Military" in the company name, Associated Military Stores, Inc., is prohibited by the statute heretofore quoted.

RETURN RECORDS TO ACQUITTED

(No. 10899—Commissioner of Police—A. A. P.—May 16, 1946.)

A person released without being convicted is entitled to have all photographs, fingerprints and other records of identification returned to him.

Citations:

Statute: IRS '45, Ch. 38, Par. 780a.

Case: 287 Ill. App. 273.

OPINION OF FOREGOING SYNOPSIS

We have your letter of May 13th, together with report from the Bureau of Identification, with reference to the request of a defendant to remove his arrest record.

Reference is made in your enclosure to our opinion of April 25, 1946, in which we stated—"in view of the authorities above referred to and our previous opinion, we hold that you do not have authority to remove, mutilate, destroy, surrender, alter, cancel or obliterate the record of the arrest of a person on the charge of violation of Chapter 193-1 of the Municipal Code of Chicago." The opinion of April 25th from which the above quoted sentence is taken was in connection with the arrest and conviction of the person making the request, the judgment of which was satisfied, and afterwards on motion the record in that case shows that the finding of guilty was vacated and at a new trial the defendant was found not guilty. The court did not have jurisdiction to enter the subsequent order in that case, and therefore that order did not affect the right of the police to refuse to turn over to him the fingerprints taken and photographs made for the reason that the judgment of the court had been satisfied. *People ex rel. Wineland v. Calhoon*, 287 Ill. App. 273.

Paragraph 780e of Chapter 38 of the Illinois Revised Statutes 1945 entitled "Sheriffs and police officers to furnish fingerprints to bureau" concluded with the following statements:

"All photographs, fingerprints or other records of identification so taken shall, upon the acquittal of the person charged with the crime,

or upon his being released, without being convicted, be returned to him."

The report which was enclosed with your request shows that the defendant "was arrested on July 20, 1932 on a general pickup, by officer J. Knowles, DB. He was later turned out on orders of Chief of Detectives Schoemaker."

The language of the statute above quoted clearly shows that a person released without being convicted is entitled to have returned to him all photographs, fingerprints or other records of identification.

Accordingly it is our opinion that this person is entitled to have returned to him all such records made in connection with that arrest.

DESTROYING GAMBLING EQUIPMENT

(No. 10933—Commissioner of Police—M. H. F.—January 8, 1947.)

After the courts have disposed of cases wherein gambling apparatus has been seized, the Police Department may then destroy the apparatus that was confiscated.

Citations:

Statute: IRS '45, Ch. 38, par. 342.

Ordinance: Municipal Code 191-6.

Cases: 173 Ill. 19.

193 Ill. 635.

393 Ill. 568.

325 Ill. App. 554.

OPINION OF FOREGOING SYNOPSIS

Your communication of January 4, 1947 states that your department custodian has in his possession various slot machines which were confiscated at the time of raids, and that "inasmuch as the courts have rendered dispositions in these cases," our opinion is requested as to whether you now may destroy the machines.

It is assumed from the above statements that all of the machines in question are devices commonly known as "slot machines," that they are gambling implements per se. We also assume that by saying that "the courts have rendered dispositions in these cases," you mean to say that all cases involving the seizure of the machines in question have been disposed of and that there is no litigation pending which affects them.

Section 2 of an act entitled "An Act to prohibit the use of clock, tape, slot or other machines or devices for gambling purposes," approved June 21, 1895 (paragraph 342, chapter 38, Illinois Revised Statutes, 1945) reads as follows:

"Gambling device defined—Confiscation.) § 2. Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall

be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found."

The constitutionality of the above quoted section has been sustained by the Supreme Court of Illinois in *Bobel v. People* (1898), 173 Ill. 19; *Frost v. People* (1901), 193 Ill. 635, and *City of Chicago v. Thomson* (1946), 393 Ill. 568.

In the *Frost* case the court said (p. 641):

"The legislature have determined that gambling implements and apparatus are pernicious and dangerous to the public welfare, and the keeping of them is an offense prohibited by law. They are, therefore, not lawful subjects of property which the law protects, but have ceased to be regarded or treated as property, and are liable to seizure, forfeiture and destruction without violating any constitutional provision."

The courts have also held that slot machines are subject to seizure and destruction regardless of whether they are actually used for gambling purposes at the time of the seizure. See *City of Chicago v. Sayer*, No. 43803, Appellate Court of Illinois, opinion filed December 31, 1946 and authorities therein cited, including *Weis v. Allman* (1945), 325 Ill. App. 554, and *Frost v. People* (1901), 193 Ill. 635.

Section 191-6 of the Municipal Code of Chicago, which section is part of the chapter on gambling, prescribing the duty of the police department in the matter of seizing slot machines and other gambling devices, provides in part as follows:

"All such tables, instruments, devices, or things when seized shall be destroyed."

Assuming, therefore, that the contraptions referred to in your letter are in fact pay-off slot machines, and basing our conclusion upon the court authorities herein referred to, our opinion is that the machines may lawfully be destroyed.

POLICE CUSTODIAN SALES

(No. 11003—Commissioner of Police—G. F. M., Jr.—October 22, 1947.)

Such moneys as may be received from the sale of unclaimed property by the Police Custodian should be turned over to the Retirement Board of the Policemen's Annuity and Benefit Fund.

Citations:

Statute: IRS '45, Ch. 24, Secs. 946, 950, 999.

Ordinances: Municipal Code, 11-17, 11-18, 11-19.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the moneys received from the sale by the police department of unclaimed property, the following is submitted:

Your letter states that you have received a communication from the Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago calling your attention to certain sections of the Municipal Code of the City of Chicago, in one section of which it is provided that the moneys received by the Police Custodian from the sale of unclaimed property should be turned over to the Policemen's Annuity and Benefit Fund of Chicago. The letter also requests that you issue such orders as are necessary to comply with the requirement set out in the Municipal Code.

The Municipal Code of Chicago, in Section 11-17 thereof, authorizes the Police Custodian to sell certain property after complying with the procedure set up in the Code in regard to property of a non-perishable nature. Section 11-18 provides for the sale of property of a perishable nature. Section 11-19 provides as follows:

"The proceeds of any sale or sales so made, after deducting the cost of storage, advertising, selling and other expenses incident to the handling or selling of such property, shall be paid by such custodian to the board of trustees of the Policemen's Annuity and Benefit Fund, to be credited to that Fund."

The Policemen's Annuity and Benefit Fund of Chicago was created by the legislature of the State of Illinois on July 1, 1921. Section 2 of the Act governing the Policemen's Annuity and Benefit Fund of Chicago (Ill. Rev. Stats. 1945, Ch. 24, Sec. 946) provides in part thereof as follows:

"A board composed of seven members shall be and constitute a board of trustees. . . . Said board of trustees shall be known as the retirement board. . . ."

Section 6 of the Act (Ill. Rev. Stats. 1945, Ch. 24, Sec. 950) in paragraph (d) thereof, provides as follows:

"The retirement board shall have the power and it shall be the duty of said retirement board to:

* * * *

"(d) Accept by gift, grant, bequest or otherwise any money or property of any kind and use the same for the purposes of the annuity and benefit fund herein provided for."

Section 54 of the Act (Ill. Rev. Stats. 1945, Ch. 24, Sec. 999) paragraph (k) thereof, provides as follows:

"(k) Gift fund: All money or property of any kind which shall be received by the retirement board for any purpose or purposes of the annuity and benefit fund herein provided for, under and by virtue of any law or laws other than this law, or as gifts, grants, or bequests, or in any manner other than as provided in any preceding section of this Act, shall be placed in this fund and the same shall be used for the purpose of the annuity and benefit fund herein provided for."

After consideration of the sections of the Act governing the Policemen's Annuity and Benefit Fund hereinabove set out, and the sections of the Municipal Code of the City of Chicago pertaining to the sale of unclaimed property, I am of the opinion that such moneys as may be received from the sale of unclaimed property by the Police Custodian should be turned over to the Retirement Board of the Policemen's Annuity and Benefit Fund, and that any orders that may be necessary to be issued to require compliance with Section 11-19 of the Municipal Code of the City of Chicago, above quoted, should be issued by your office.

C. T. A. ACCIDENTS

(No. 11005—Commissioner of Police—S. A.—October 28, 1947.)

There is no question that the employees of the Chicago Transit Authority are subject to investigation by the Chicago Police Department in accident cases in the same manner as they were formerly when employed by the Chicago Surface Lines.

No References.

OPINION OF FOREGOING SYNOPSIS

Your letter of October 13th attaching a copy of report from the Commanding Officer of the 1st District, has been referred to this division for a legal opinion. The question raised is whether the Chicago Transit Authority has the right to withhold their employees from questioning by the Police Department in accident cases.

A careful check of the Metropolitan Transit Authority Act fails to reveal any such right conferred upon the officers and employees of the Chicago Transit Authority. An inquiry was thereupon directed to Mr. Lynch of the C.T.A. claim department to ascertain by what authority he assumes this position and were advised that it was all a misunderstanding and in the future they will be most happy to cooperate with the Chicago Police Department.

There is no question that the employees of the Chicago Transit Authority are subject to investigation by the Chicago Police Department in accident cases in the same manner as they were formerly when employed by the Chicago Surface or Rapid Transit Lines.

SALE OF ABANDONED AUTOS

(No. 11039—Purchasing Agent—A. J. R.—March 2, 1948.)

The action of the police in taking and retaining custody of abandoned automobiles is in enforcement of a state statute, the action to be taken in the disposition of these vehicles will be only a completion of the enforcement of the same statutory provisions. The sale of abandoned vehicles by the police department is not made by or on behalf of the City of Chicago within the meaning of the Municipal Purchasing Act and therefore the sale should be conducted by the police and not the Purchasing Agent.

Citation: IRS '47, Ch. 95½, pars. 42 to 49.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your request for an opinion as to whether the Municipal Purchasing Act contemplates that the Purchasing Agent, rather

than the Police Department, shall be charged with responsibility for the sale of abandoned automobiles on the police lot at 3000 S. California Ave.

In taking possession of these abandoned motor vehicles the police acted under and in accordance with the provisions of Section 35a and 35b of the Motor Vehicle Law of the State of Illinois (Ill. Rev. Stats. 1947, Chap. 95½, Pars. 42 and 43) and the disposition of those vehicles is governed by Sections 35c, 35d, 35e, 35f, 35g and 35h of that Act (Pars. 44 to 49 both included).

The Municipal Purchasing Act relates only to transaction "by or on behalf of any such municipality."

It is our opinion that since the action of the police in taking and retaining custody of these vehicles was in the enforcement of a statute of the state, the action to be taken in the disposition of these vehicles will be only a completion of the enforcement of the same statutory provisions, the sale of these vehicles is not "made by or on behalf of" the City of Chicago within the meaning of the Municipal Purchasing Act, and that therefore the sale should be conducted by the police as heretofore.

C. BOARD OF HEALTH

CARE OF THE SICK BY MUNICIPALITY

(No. 10731—President, Board of Health—C. P. H.—January 4, 1943.)

The care of the sick and the preservation of the public health are governmental functions. Municipalities are not responsible for injuries resulting from the negligent acts of their employees while performing such functions.

References:

- Coun. J. Sept. 9, 1942, p. 7487.
18 Op. Corp. Coun., p. 164, No. 8025; p. 908, No. 8490; p. 909, Nos. 8928 and 8851; p. 910, No. 7130.
19 Op. Corp. Coun., p. 474, No. 9411; p. 475, No. 9111; p. 476, No. 9423; p. 477, Nos. 9689 and 9088.

OPINION OF FOREGOING SYNOPSIS

We have your letter transmitting a proposed form of consent and release to be signed by patients of the Intensive Treatment Center of the Board of Health of the City of Chicago before they are given necessary medical or surgical treatment for venereal diseases. In the case of a minor or other person under disability, the form is to be signed by his parent, guardian, or conservator.

You request our opinion as to whether or not the proposed document, when properly executed, releases the City from all claims for damages that may arise from any treatment given by the Intensive Treatment Center to the person named in the document. You also ask our opinion as to whether or not the document is in proper form.

The Board of Health, under Section 9-18 of the Municipal Code of Chicago, is prohibited from compelling any person to submit to any medication against his will or without his consent. The patients of the Intensive Treatment Center, however, are not compelled to submit to any medical or surgical treatment but voluntarily request such treatment. Therefore, in our opinion it is not necessary for the Intensive Treatment Center to obtain the written consent of a person who voluntarily requests such treatment before it is given. (Op. Corp. Council to Pres., Bd. of Health, dated Nov. 24, 1941.)

Furthermore, in our opinion the Intensive Treatment Center is not required to obtain a written release from a patient in order to release the City from all claims for damages that may arise out of giving him treatment. It is a well established principle of law that the care of the sick and the preservation of the public health by municipalities are governmental functions and that municipalities cannot be held liable for the negligent acts of their employees or agents in the performance of governmental functions. (Op. Corp. Coun. Vol. XVIII, p. 164, No. 8025; p. 908, No. 8490; p. 909, Nos. 8928 and 8851; p. 910, No. 7130; Vol. XIX, p. 474, No. 9411; p. 475, No. 9111; p. 476, No. 9423; p. 477, Nos. 9689 and 9088.) The City of Chicago operates and maintains the Intensive Treatment Center with Federal funds for the purpose of giving treatment and care to persons infected with venereal diseases, and therefore the City is not liable for any negligent acts of its agents or employees in performing this service. (Coun. J. Sept. 9, 1942, p. 7487.)

APPOINTING ALIEN DOCTORS

(No. 10735—President, Board of Health—C. P. H.—January 30, 1943.)

The Board of Health, with the consent of the Civil Service Commission, may appoint alien doctors for temporary service during the war emergency.

Citations: IRS '41, ch. 24½, par. 44, sec. 6; par. 48, sec. 10; par. 50, sec. 11. Ch. 91, pars. 1 to 16.

Ordinance: Municipal Code, Secs. 25-1 to 25-41.

OPINION OF FOREGOING SYNOPSIS

The large number of doctors leaving the private practice of medicine to join the armed forces during the present national emergency has caused a shortage of civilian physicians. This depletion of doctors has so seriously threatened the nation's health that the government is considering a program to allocate or ration physicians for civilian needs on a nation-wide basis. Because of the scarcity of physicians, according to your letter of December 1, 1942, there are not enough doctors, who are citizens of the United States, to be appointed by the Board of Health as resident physicians at the Contagious Disease Hospital. You state that the advisory board of the hospital claims that it will be necessary to accept for these positions aliens who are believed to be loyal to the United States, or face the possibility of closing the institution.

In your letter of January 8, 1943, you request our opinion as to whether or not the Board of Health has authority to appoint doctors, who are not citizens of the United States, as resident physicians at the Contagious Disease Hospital and pay them a salary.

The Act entitled, "An act to regulate the civil service in cities", provides in part as follows:

"Sec. 6. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subject to examination, which shall be public, competitive, and open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. * * *" (Ill. Rev. Stats. 1941, Chap. 24½, par. 44.)

Section 11 of the Act specifically exempts from the classified service elected officers, officials whose appointments are subject to confirmation by the city council, heads of principal city departments, members of the law department, police officers above the rank of captain and one private secretary of the mayor. (Ill. Rev. Stats. 1941, chap. 24½, par. 50.)

Section 10 of the Act provides that "to prevent the stoppage of public business, or to meet the extraordinary exigencies, the head of any department or office may, with the approval of the commission, make temporary appointments to remain in force not exceeding sixty days, and only until regular appointments under the provisions of the act can be made. (Ill. Rev. Stats. 1941, chap. 24½, par. 48.)

The above quoted provisions of the Act require that all applicants for positions in the classified service in the city shall be citizens of the United States. However, as pointed out in our former opinion with reference to this subject, these provisions of the Act do not prohibit the temporary employment of persons who are not citizens of the United States in positions for which no civil service examination has been held. (Opin. of Corp. Coun. addressed to President, Board of Health, dated December 15, 1942.)

The Civil Service Commission has not held an examination for the position of resident physician at the Contagious Disease Hospital and under Section 10 of the Act, the Board of Health, with the approval of the Commission, has authority to appoint qualified persons temporarily to such positions. Furthermore, Section 10 of the Act does not require persons who are serving under temporary appointment to be citizens of the United States. We have also examined sections 25-1 to 25-41 of the Municipal Code of Chicago relating to officers and employees and find no provision which requires that temporary employees be citizens of the United States.

In the Annual Appropriation Ordinance for the year 1943, the City Council has expressly authorized the payment of salary to each of the six (6) resident physicians to be employed at the Contagious Disease Hospital at the rate of \$1,320.00 per annum. (Coun. J. Jan. 8, 1943, p. 8080.)

It is therefore our opinion that the Board of Health, with the consent of the Civil Service Commission, may appoint persons as resident physicians to serve at the Contagious Disease Hospital, for periods not exceeding sixty (60) days, and pay them a salary at the rate designated in the Annual Appropriation Ordinance referred to herein provided, however, that they are licensed to practice medicine under and by virtue of the provisions of the Medical Practice Act of the State of Illinois; and that they do not practice medicine in violation of the provisions of this Act. (Ill. Rev. Stats. 1941, chap. 91, pars. 1 to 16x.)

INVENTIONS OF CITY EMPLOYEES

(No. 10740—President, Board of Health—F. V. M.—March 19, 1943.)

The Board of Health does not have the authority to define the rights of an employee and of the City pertaining to inventions conceived by persons while employed by the Board of Health.

Citations:

Ordinances: Mun. Code, 9-13.

Cases: 1 How. 202.

137 U. S. 342, 346.

150 U. S. 193.

261 U. S. 24, 36.

289 U. S. 178, 188.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of January 28, 1943 in which you ask us to pass upon the legality of an order of your department reading in part as follows:

" * * * Any employe of the department, who invents or discovers any new and useful art, machine, manufacture, or composition of matter connected with the work of the department, through the expenditure of City time and funds, or with the aid of City facilities, will secure the approval of the President of the Board of Health before applying for letters patent thereon, and said letters patent will, if so determined by the President of the Board, then be secured in the name of the inventor without expense to him and in such manner as to allow the City government, or any citizen of Chicago, to use the subject of said patent without the payment of royalties."

The question which presents itself is whether or not the Board of Health by order or regulation can establish the respective rights of the City and the employees of the City to inventions which are conceived by them during the course of their employment.

It has been said that an inventor has a natural right separate from, and independent of, any patent grant to make, use, and vend his invention. In the case of *Crown Co. v. Nye Tool Works*, 261 U. S. 24-36 the court said:

" * * * The error in the position of the respondent and the court below is in a failure to distinguish between the property or title or interest in a patent capable of assignment and the chief incident of that property, title or interest, an incident which can only pass by assignment when attached to the right to make, use and vend. It is the fact that the patentee has invented or discovered something useful and thus has the common law right to make, use and vend it himself * * * "

In one of the leading cases pertaining to the respective rights of employee and employer (in this case the United States Government), *Solomons v. U. S.*, 137 U. S. 342-346 the court said:

" * * * An employe, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention

he may thus conceive and perfect is his individual property. There is no difference between the government and any other employer in this respect. But this general rule is subject to these limitations. If one is employed to devise or perfect an instrument, or a means of accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. * * *

Also in the case of *U. S. v. Dubilier Condenser Corp.*, 289 U. S. 178, 188 the court said:

"* * * Recognition of the nature of the act of invention also defines the limits of the so-called shop-right, which shortly stated, is that where a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a non-exclusive right to practice the invention. *McClurg v. Kingland*, 1 How, 202; *Solomons v. United States*, 137 U. S. 342; *Lane & Bodley Co. v. Locke*, 150 U. S. 193. This is an application of equitable principles. Since the servant uses his master's time, facilities and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business. But the employer in such a case has no equity to demand a conveyance of the invention, which is the original conception of the employee alone, in which the employer had no part. This remains the property of him who conceived it, together with the right conferred by the patent, to exclude all others than the employer from the accruing benefits. * * *

We believe that the conditions under which a particular invention is conceived and produced by the employee must govern in determining the respective rights of the employee and the city in and to the invention.

We are therefore of the opinion that:

1. The Board of Health is without authority to define the rights of an employee and of the city pertaining to such a patent by the issuance of the order which you have submitted to us for approval.

2. That such an order does not apply to the sanitary condition of the city or the prevention and suppression of disease and therefore is not authorized by Section 9-13 of the Municipal Code of Chicago reading in part as follows:

"9-13. The board of health shall have power to make such rules and regulations, as it may deem necessary or advisable, in relation to the sanitary condition of the city and for the prevention and suppression of disease, * * *

LIABILITY OF CITY FOR ATTORNEY'S FEES

(No. 10752—Chairman, Finance Committee—M. H. F.—July 26, 1943.)

Attorney's fees expended by two health department officers in defense of a law suit charging them with misconduct in performance

of duties not within the scope of their employment, are not matters in which the City has an interest, and the City cannot reimburse such officers for the fees expended in defense of said suit.

Citations:

Constitution: Art. XII, Sec. 7, Illinois State Constitution.
 Council orders: Coun. J. p. 4280, Feb. 2, 1941.
 Cases: 58 Ill. 353. 374 Ill. 594.
 130 Ill. 238, 245. 203 N.Y.S. 71.
 182 Ill. 135, 140. 238 N.Y. 628.
 290 Ill. 370, 372. 60 Conn. 230-233.
 306 Ill. 119. 72 Tenn. 69.
 Other references: 18 Op. Corp. Coun. 109.
 2 McQuillin Corp. 2d ed. sec. 532.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date transmits the claims of Paul F. Krueger, Chief Sanitary Officer of the City Health Department, and William J. Guerin, Director of the Dairy Inspection Section of the City Health Department, for reimbursement for attorneys' fees and bond expenses incurred in the defense of themselves in case No. 31197, District Court of the United States. Each claim is for the sum of \$1,165.00. No data is submitted in support of the claims. Our opinion is requested as to the city's liability to pay the claims.

We have inspected the records in the office of the Clerk of the District Court of the United States at Chicago and from such inspection find that on November 1, 1938 an indictment containing four counts was filed against ten large milk distributing companies, referred to as "major distributors", selling fluid milk in the City of Chicago, and certain of their officials; two milk dealer's associations and certain of their officials; a milk dealer's bottle exchange and certain of its officers; a milk wagon driver's union and its principal officers; the president of a teamster's union; a police officer of the City of Chicago, assigned to the office of the State's Attorney of Cook County, Illinois; two citizens of the State of New York, who acted as arbitrators in a dispute between a milk association and the major distributors; Herman N. Bundesen, President of the Board of Health of the City of Chicago; Paul Krueger, Chief Sanitary Officer of the Dairy Section of the Board of Health of the City of Chicago; and William J. Guerin, Chief of City Dairy Inspection, of the Board of Health of the City of Chicago.

The indictment charged that beginning in the month of January 1935 the defendants unlawfully combined and conspired to arbitrarily fix, maintain and control artificial and noncompetitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan and Wisconsin, including all fluid milk so produced and shipped into the City of Chicago, and that they engaged in an unlawful combination and conspiracy in restraint of trade and commerce in fluid milk, in violation of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies". It further charged that the combination was effected by means of price fixing agreements. The defendants Herman N. Bundesen, Paul Krueger and William J. Guerin were charged with acting in concert with the other defendants, in the execution of the alleged conspiracy, in disregard of their lawful duties as officials

of the Board of Health, with giving preferential treatment in the matter of the inspection of dairy farms to member-producers and to independent producers selling milk to the major distributors, with imposing illegal burdens on independent producers who refused to sell their milk at the fixed prices or who sold milk at lower prices, and with refusing to inspect dairy farms of independent producers who desired to sell milk to independent distributors in Chicago. Under Count Three these defendants were charged with refusing, upon arbitrary and capricious grounds not within the scope of the authority conferred upon them by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder, to grant permits to prospective distributors; with requiring independent distributors to purchase and install new and expensive equipment and fixtures, construct new buildings and alter old buildings, which requirements were not within the scope of the authority conferred upon them by said ordinances, rules and regulations; with closing, arbitrarily and capriciously, and without notice and an opportunity for hearing, the plants of independent distributors for minor or feigned charges of infraction of said ordinances, rules and regulations; with harrasing and annoying, continually, independent distributors by minor or feigned charges of infraction of such ordinances, rules and regulations; with refusing to inspect the farms of independent producers intending to supply milk to independent distributors; and with cancelling and revoking, arbitrarily and capriciously, and without notice and opportunity for hearing, upon minor or feigned charges of infraction of said ordinances, rules and regulations, the permits of producers to ship milk into Chicago.

Summonses and bench warrants being issued, Dr. Bundesen and claimants Krueger and Guerin entered their appearances by a Chicago attorney of their choosing, one Charles F. Rathbun. Also each of them executed and filed a surety company appearance bond. On December 8, 1938 a plea of not guilty was entered as to these three defendants. The other defendants filed demurrers and motions to quash the indictment. Arguments were had before District Judge Woodward on the demurrers and motions, participated in by several attorneys representing the other defendants. On July 28, 1939, the District Judge having ruled in favor of the defendants, an order was entered quashing and dismissing the indictment as to all defendants. The docket shows that on the following day Attorney Rathbun, upon leave of court, withdrew the pleas of not guilty and filed instanter a joint and several demurrer for defendants Bundesen, Krueger and Guerin.

The Government appealed the case to the Supreme Court of the United States, and on January 8, 1940 the mandate of the Supreme Court was filed in the lower court reversing as to Counts One, Two and Four of the indictment, and remanding the case to the lower court for further proceedings. Meanwhile, and on January 3, 1940, Robert E. Crowe was substituted for Rathbun, as attorney for Bundesen, Krueger and Guerin. We assume, though have no certain knowledge of the fact, that the attorney representing defendants Bundesen, Krueger and Guerin participated to some extent in the case before the Supreme Court.

After remandment of the case to the District Court, the demurrers of the several defendants were reargued and by the court overruled; whereupon the defendants filed motions that the Government be required to file a Bill of Particulars. No Bill of Particulars was ever filed. On September 16, 1940, on the Government's motion, the case was nolle prossed as to all defendants. It is reported that before dismissing the indictment the Government secured something in the way of an agreement from all defendants, except the Chicago police officer, Bundesen, Krueger and Guerin, whereby they agreed not to violate the law, but in which they did not admit that they had violated the law.

It should be noted that Krueger and Guerin, as well as Dr. Bundesen, were charged with offenses "in disregard of their lawful duties as officials

and agents of the Board of Health" and with acts "not within the scope of the authority conferred upon said defendants by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder." In other words they were not charged with acts done in enforcing the ordinances of the city or the rules and regulations promulgated by the Board of Health thereunder, but with acts outside of the scope of their lawful duties as officials and agents of the Board of Health, acts beyond the scope of the authority conferred upon them by such ordinances, rules and regulations.

The validity of the city's ordinances in force during the period alleged in the indictment, which ordinances required milk dealers to be licensed, prescribed sanitary conditions in dairies, provided for periodic inspections, and prohibited the sale of milk for human food within the city unless pasteurized or produced in dairies inspected and approved by the Board of Health, was not challenged. Neither was the validity of the rules and regulations of the Board of Health questioned by the Government.

Whether the city official defendants were unjustly indicted is not for us to determine, though it may be argued that the fact that the indictment was finally dismissed on the Government's own motion would indicate that it should not have been presented against these individuals. Doubtless Krueger and Guerin, due to their employment as agents of the health department, charged with performance of duties under the city's milk regulation ordinances, were placed in an unfortunate position, one requiring that they defend themselves against a Federal court indictment. Being indicted they could not safely escape the employment of an attorney to represent them in the court proceedings. This they did, presumably at their own expense. The use of the term "expenses incurred" indicates that they have merely obligated themselves to pay the attorneys' fees and bond expenses, but have not already expended the sums which they seek to recover from the city. However, this is not an important consideration, unless it should develop that the attorneys' fees charged were made contingent upon recovery from the city. Whatever our views may be upon the equities involved in a situation where city employes find themselves indicted without, as they doubtless believe, just cause, we are not at liberty to treat the matter before us otherwise than as a pure question of law, whether the city is legally obligated to pay the claims.

When sued as municipal officials, for acts committed in good faith in the discharge of their duties, it is proper that such officials should be defended by the Corporation Counsel and thus relieved from the personal obligation to pay attorney's fees. Under the provisions of the Municipal Code of Chicago the Corporation Counsel is the law officer of the city and he has entire charge of all legal matters and litigation in which the municipality is interested, and he only is authorized to represent the municipality and its officials when sued in their official capacities. Hence it follows that a municipal officer or department has no authority to employ an attorney at the expense of the public. *The People v. Faherty* (1922), 306 Ill. 119. In fact it is now provided by section 6-2 of the code, amendment of February 2, 1941, Coun. J. p. 4280, that the Corporation Counsel shall appear for and defend any member, officer or employe of the board of health, police department or fire department who is sued personally for damages claimed in consequence of any act or omission of his official duties or in consequence of any act under color of authority or in consequence of any alleged negligence while engaged in the performance of such duties. The defense of city officials in criminal cases is however not specifically mentioned. The section covers only cases in which the employe is sued personally for damages. Of course, had Krueger and Guerin requested the Corporation Counsel to represent them in the case under consideration their request would properly have been denied for the reason

that they were not indicted for acts committed in the discharge of their official duties under the city's ordinances.

Section 7 of Article XII of the Act of April 10, 1872, relating to the City of Chicago, in force during the period of time covered by the indictment, provides in part as follows:

"The corporation counsel shall be and act as the legal adviser of the city council and of the several officers, boards and departments of the city. He shall appear for and protect the rights and interests of the city in all actions, suits and proceedings brought by or against it or any city officer, board or department, including actions for damages when brought against such officer in his official capacity; provided, however, that when an officer or employee of the city is sued personally, even if the cause of action arose out of his official duties, the corporation counsel shall appear for such officer or employee only in case the city council directs him to do so."

It is doubtful under the authority of this act whether the city council could authorize the expenditure of public monies in defense of officials or employes charged with what amounts to malfeasance in office. Furthermore, the city council did not direct the corporation counsel to defend Krueger and Guerin or authorize any other attorney to defend them at city expense. Had it done so it is questionable if either the corporation counsel or such other attorney would have been in a position to accept employment which would require protection of the interests of the city and the defense of city officers or employes charged with violating their obligation to the city. The employment would be an incompatible one, as an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties (*People ex rel. Livers v. Hanson* (1919), 290 Ill. 370, 372).

The question presented to us is not new. In an opinion given December 23, 1941, Opinion Bulletin No. 4 (July 1, 1941 to July 1, 1942), page 11, it was determined that the city was not liable for the cost of legal services rendered to defend a law suit against a former city treasurer for alleged misappropriation of tax monies to the injury of holders of unpaid tax anticipation warrants. The case of *Leviton v. Board of Education* (1940), 374 Ill. 594, was relied upon to support the conclusion reached. The *Leviton* case holds that a breach of duty by an officer of the Board of Education does not create a general liability against the Board.

In an opinion given the Mayor March 16, 1932, Opinions of the Corporation Counsel, Volume XVIII, page 109, it was held that the city as a municipality has no interest in a suit brought against a police officer, even though the controversy arises out of acts connected with the performance of a duty by the officer.

On June 15, 1931, Opinions of the Corporation Counsel, Volume XVIII, page 109, the Chairman of the Committee on Finance was advised that the city, not being a party to a suit in which it is defending certain of its police officers, was not liable for any loss or damage arising from the suit.

City of Chicago v. Williams (1899), 182 Ill. 135, holds that it is not the duty of the Corporation Counsel to defend at the expense of the city a suit to recover damages for false imprisonment brought against police officers individually and to which the city is not a party. The expense of defending damage suits brought against city officers for torts for which they are individually liable only cannot be paid out of the contingent fund appropriated for legal expenses. On page 140 of its opinion the court said:

"The city of Chicago would have no power to make an appropriation of the public funds to pay the expenses of defending such a suit, as that which was brought by Quinlan against Badenoch and Fitzpatrick. The second paragraph of Section 1 of article 5 of the Cities and Villages act, which is the charter of the city of Chicago, gives to the city power 'to appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.' To appropriate money for the defense of a suit for damages, brought against a police officer because of an illegal arrest made by him, is not to appropriate money for a corporate purpose. Such an appropriation of money would not be providing for the payment of the debts and expenses of the corporation. And if money could not be appropriated by an ordinance for the payment of the expenses of defending such a suit, a contract could not be made with a stenographer, or other person, by any officer of the city making the city liable to pay money therefor."

In *Culver v. City of Streator* (1889), 130 Ill. 238, it was held that the city was not liable for assault and battery committed by the police officers though done in an attempt to enforce an ordinance of the city, nor for illegal and oppressive acts of officers committed in the administration of an ordinance, nor for an arrest made by them which is illegal for want of a warrant. In the opinion the court said (p. 245):

"The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations."

In the case of *Kilroe v. Craig*, 208 App. Div. 93, 203 N. Y. S. 71 (Affd. 238 N. Y. 628), 144 N. E. 920, it was held that the expenditures of an assistant district attorney of New York county in successfully defending himself against criminal charges of misconduct in office are not expenditures for a "city purpose," or from which the city derived any benefit, and the city comptroller cannot be compelled to consider a claim for such expenses.

Board of Trustees v. Schroeder (1871), 58 Ill. 353, holds that a municipal corporation is not liable for the illegal and unauthorized acts of its officers in administering an ordinance, nor is it made liable by the fact that its board of trustees are cognizant of the tortious acts, or even participate therein. In this case a town officer held in custody a person committed by a verbal order of a police magistrate for nonpayment of a fine imposed for the breach of the town ordinance.

In *Smith v. Nashville*, 72 Tenn. 69, the court held that the city could not employ an attorney to defend, at the expense of the city, a suit brought against the Mayor and other officials for malfeasance in office, since there was no liability on the part of the city to pay.

There are authorities to the effect that where a municipal officer incurs a loss in the discharge of his official duties in a matter in which the municipality has an interest, and in the discharge of a duty imposed or authorized by law, and in good faith, the municipal corporation has the power to appropriate funds to reimburse him, unless expressly forbidden. (2 McQuillin on Municipal Corporations, 2d ed., section 532, and cases cited.) A variety of circumstances in which a municipal corporation may indemnify or reimburse appear in the adjudications. The true test in all such cases is, did the act done by the officer relate directly to a matter in which the city had an interest, or affect municipal rights, or property, or rights or property of the citizens which the officer was charged with a duty to protect or defend. It has been said that in order to justify the

expenditure of money by a municipal corporation in the indemnity of one of its officers for loss incurred in the discharge of his official duty, three things must appear. First, the officer must have been acting in a matter in which the corporation had an interest. Second, he must have been acting in the discharge of a duty imposed or authorized by law. Third, he must have acted in good faith. (*Hotchkiss v. Plunkett*, 60 Conn. 230, 233.) While in the instant matter we have no reason to doubt that Krueger and Guerin acted in good faith while performing the duties assigned them in the Health Department, there seems no escape from the conclusion that the acts charged against them in the Government's indictment were acts beyond the scope of their duties of municipal officials imposed upon them by the ordinances, and the rules and regulations of the Board of Health, and being outside such ordinances, rules and regulations that they were not matters in which the city had an interest. In this connection it has already been observed that in the indictment they were charged only with acts "in disregard of their lawful duties as officers and agents of the Board of Health of the City of Chicago," with acts "not within the scope of the authority conferred upon them by the ordinances of the City of Chicago and the rules and regulations promulgated thereunder." To expend the city's money in the payment of attorneys' fees and expenses in defending Krueger and Guerin against this indictment would be to expend it for a non-corporate purpose, and therefore unwarranted in law.

Our opinion therefore is that the claims should not be allowed.

COMPELLING CHRISTIAN SCIENTIST TO SUBMIT TO MEDICAL TREATMENT

(No. 10758—*F. V. M.*—December 6, 1943.)

A Christian Scientist can be compelled to submit to medical treatment only if he is afflicted with a disease that is communicable, contagious, and infectious as specified in the Municipal Code.

Citation: Mun. Code; 9-15, 9-16.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of recent date in which you state that you have a rooming house, and that one of the roomers, who is a Christian Scientist, is now very ill and refuses to have a doctor, and you ask to be advised what you can do in the matter.

The Board of Health of the City of Chicago has authority under certain conditions only to forcibly cause a person who is ill to submit to medical treatment. The following sections of the Municipal Code apply:

"9-15. The board of health, with a view to the preservation of the public health, shall give to the mayor and other city officials all such professional advice and information as they may require, and whenever it shall hear of the existence of any contagious or epidemic disease, such as diphtheria, measles, membranous croup, puerperal fever, scarlet fever, smallpox, typhoid fever, whooping cough, and so forth, the board shall investigate the same, and adopt measures to arrest its progress.

"9-16. The board of health shall cause all persons reported to it as having, or suspected of having, a contagious, epidemic, or communicable disease to be visited and examined, and shall impose such restrictions upon, and exercise such supervision over such persons as shall be necessary to protect other persons. To aid in securing the isolation of a person having, or suspected of having, a contagious, epidemic, or communicable disease, the board of health may cause a notice of the disease to be placed upon or near the house, apartment, or building in which the person is sick. No person shall deface, alter, conceal, mutilate, destroy, or tear down, any such notice without permission from the board of health, and every occupant of the house, apartment, or building upon which, or near which, the notice is placed, shall be responsible for the removal of the notice. The board of health may cause a person having, or suspected of having, a contagious, epidemic, or communicable disease to be removed to a hospital or other safe place not exceeding three miles from the city. The board of health may cause a person having or suspected of having, a contagious, epidemic, or communicable disease to be provided with suitable nurses and medical attention, at his own expense if he is able to pay for the same, but if not, then at the expense of the city."

We have therefore notified the Board of Health of the illness of the person mentioned in your letter, and should she be suffering from any of the diseases referred to in the foregoing sections of the Code, a suitable course may be pursued to properly supervise her treatment and care.

CONSENT OF PATIENTS

(No. 10782—President, Board of Health—F. V. M.—May 2, 1944.)

Consent of a pregnant girl of minor age, married or unmarried, is sufficient authority for the Health Department to proceed with an examination and such pre-natal care as she requests.

Citations:

Statutes: IRS '43, ch. 3, sec. 283.

Cases: 224 Ill. 300.

212 Ia. 914, 925.

144 Mich. 632, 634.

95 Minn. 261.

105 N. E. 92, 93 (N. Y.).

Other references: Amer. Jurisp. Vol. 41, par. 111.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter dated March 16, 1944, in which you state that you have in your prenatal clinics at various times and particularly since the beginning of the war pregnant girls of minor age, some of them illegitimately so; that before making examinations, taking blood specimens, etc., you have insisted that each girl be accompanied by her mother or guardian, who is required to give a signed consent for any necessary procedures. You ask to be given a legal opinion on several questions which we will answer in the order stated.

At what ages, in the State of Illinois, do boys and girls cease to be minors?

In answer to this question we quote from the Ill. Rev. Stat. 1943, chap. 3, § 283, p. 58:

"283. § 131. Minors—Who Are.) Males of the age of twenty-one and females of the age of eighteen years shall be considered of legal age for all purposes; and until these ages are attained, they shall be considered minors."

In answering your other questions which follow, we are assuming that no surgical operations are included in the prenatal care mentioned.

Does the law require that the consent of a parent or guardian of a minor unmarried girl, who is pregnant, be obtained for the procedures of prenatal care before they are used?

If a minor girl is married and is pregnant, can her husband take the place of parent or guardian in giving such consent?

If the husband is away and cannot be reached for consent, or for any other reason is not able to give his consent, is it necessary that the consent of a parent or guardian be obtained?

If the husband and wife are both minors, must the consent of a parent or guardian of the girl be obtained?

In the case of *Schloendorff v. Society of New York Hospital*, 105 N. E. 92, 93, the court said:

"* * * Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197; *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303. This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained." * * *

However, in none of the cases cited do we find the question of the authority of a physician to examine or treat a minor passed upon. As to surgical operations we find many authorities. In the case of *Jackovich v. Yocum*, 212 Iowa 914, 925, involving an operation performed on a boy seventeen years of age who was injured in jumping from a moving train, the court said:

"* * * 'The court's instructions in reference to the consent of the parents were entirely fair to the plaintiff. In substance, the jury was told, among other things, that, in the absence of an emergency calling for immediate action for the preservation of the life or health of the patient, an operation on a patient in possession of his faculties and in such physical health as to be able to consult about his condition, without the consent, express or implied, of the patient, or someone authorized to act for him, constitutes an assault.'" * * *

We quote further from *American Jurisprudence*, Vol. 41, § 111, p. 223:

"* * * 'It would seem to be a matter of sound precaution for a surgeon to obtain the father's consent before operating on his minor child, but it has been held that in special circumstances a surgeon is not bound at his peril to obtain the father's consent before operating

on a minor who is mentally competent and of understanding age and who has consented to the operation, or on a child of more tender years where an emergency existed threatening the life of the child. In an extreme emergency the consent of the mother of an infant patient is sufficient to protect the surgeon." * * *

The case of *Bakker v. Welsh*, 144 Mich. 632, 634, involved an operation to be performed on a boy seventeen years old, without the consent of his father, who died during the administration of the anaesthetic. The court said:

* * * "We then come to the question: Are defendants liable in this action because they engaged in this operation without obtaining the consent of the father? Counsel for the plaintiff are very frank with the court, and say in their brief:

'We are unable to aid the court by reference to any decisions in point. We have devoted much time and research to this interesting question, but have been unable to find any decisions of a higher court either supporting or opposing the plaintiff's contention, and we will therefore have to be content by calling the court's attention to such general reasoning as leads us to take the view herein contended for.'

They then argue at length, and with a good deal of force, that, as the father is the natural guardian of the child, and is entitled to his custody and his services, he cannot be deprived of them without his consent. We quote:

'We contend that it is wrong in every sense, except in cases of emergency, for a physician and surgeon to enter upon a dangerous operation, or, as in this case, the administration of an anaesthetic, conceded to be always accompanied with danger that death may result, without the knowledge and consent of the parent or guardian.'" * * *

In the absence of any definite ruling to the contrary, we are of the opinion that by reason of her age the consent of a pregnant girl of minor age, married or unmarried, is sufficient authority for you to proceed with such examination and prenatal care as she requests.

You then inquire if the following form of written consent is legally adequate:

Chicago Health Department
Child Health Section
Nursing Service

I hereby authorize the Health Department Physician to give a maternal examination and care to

.....who is.....years of age
Name
.....Signed.....
Date Parent or Guardian
Address

In view of what we have heretofore stated, we believe the form should be prepared for the signature of the minor, and that it would be improved by adding two lines thereto for the signatures of witnesses so that in case the signature in question was disputed, you would have other evidence that it was signed by her.

SICK PAY FOR HEALTH DEPARTMENT

(No. 10820—President, Board of Health—F. V. M.—October 16, 1944.)

Employees of the Health Department being paid from Federal Government Lanham Act Funds should not be retained after having had serious illness and attacks while at work unless funds are made available to pay compensation awards in event of their injury, and the City being held responsible. Such employees are held in their positions by appointment by Dr. Bundesen, not individually, but as President of the Board of Health.

Citations:

- Statute: Lanham Act, Public Law No. 849—75th Congress, ch. 862,
3rd session.
IRS' 43, Ch. 48.
Ordinance: Coun. Journal, Jan. 19, 1944, p. 1133.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of recent date in which you state that two employees of the Health Department being paid from Federal Government Lanham Act funds have serious illnesses and on several occasions in the past have had attacks while at work. You further state that it is possible that if attacks occur in the future, serious injury to these employees may result.

You ask for an opinion as to the following:

- (1) Is the city liable for any injury incurred?
- (2) If so, should they be dismissed, or may they sign waivers to release the city of any claim?

We will answer these inquiries in the order named.

In accordance with the terms of the Lanham Act (Public Law No. 849—76th Congress, Chap. 862—3rd Session, approved October 14, 1940 as amended) an ordinance was passed by the City Council January 19, 1944, (Coun. J. January 19, 1944, p. 1133) accepting an offer by the United States of America of federal assistance for maintenance of operation of venereal disease hospital facilities for one year commencing January 1, 1944.

Under the terms of the ordinance the City Treasurer is authorized to receive from the United States of America and to hold ex-officio custodian thereof, such sums of money as the Federal Works Administrator shall determine to be sufficient, with other available funds, for the maintenance and operation for the period of one year from January 1, 1944, of venereal disease hospital facilities and the City Comptroller and the City Treasurer are authorized to disburse the money so held by the City Treasurer upon the order of the President of the Board of Health of Chicago.

Upon inquiry we are informed by your department that at quarterly periods checks are received from the federal government payable to "Dr. Herman N. Bundesen, President of the Board of Health, Chicago" which are in turn endorsed by you and transmitted to the City Comptroller. Monthly pay rolls prepared by you are sent to the Comptroller and checks payable to the employees of the venereal disease hospital facilities are drawn against the "Contribution Account."

We are informed that budgets covering the expenditures to be made under the terms of the aforesaid ordinance are from time to time submitted to the government for approval and not to the City Council, nor does the City Council appropriate for the expenditures on account of the venereal disease hospital.

Upon further inquiry we are informed by your department that all employes of the venereal disease hospital facilities are hired and discharged by you as President of the Board of Health.

We also call your attention to the fact that the building located at 2449 Dearborn Street, Chicago, Illinois, which has been occupied for the purpose of operating said venereal disease hospital facilities, has been leased by Wesley Memorial Hospital, Inc., to Herman N. Bundesen (not individually but as President of the Board of Health of Chicago).

We assume that your query as to the liability of the city for injury to the employes mentioned pertains to workmen's compensation and we quote from the Workmen's Compensation Act passed by the state legislature June 10, 1911, as amended: (Ill. Rev. Stat. 1943, Chap. 48, pp. 1585, 1586)

"139. Act applies automatically to certain employment.) § 3. The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, * * *

"142. Term 'employee' defined.) § 5. The term 'employee' as used in this Act, shall be construed to mean:

"First—Every person in the service of the State, including all persons in the service of the University of Illinois on or after January 25, 1933 except members of the instructional, research, and administrative staffs thereof when not, at the time of the injury, actually engaged in an occupation declared to be extra-hazardous in Section Three (3) of this Act, county, city, town, township, incorporated village or school district, body politic, or municipal corporation therein, under appointment or contract of hire, express or implied, oral or written, * * *

Notwithstanding the facts herein disclosed which indicate that the operations of the venereal disease hospital are independent of all corporate functions of the city, these employes may be held to be in the service of the city by reason of their appointment by Dr. Bundesen, not individually, but as President of the Board of Health.

Answering your second inquiry we are of the opinion that it is unsafe to retain these employes unless funds are made available to pay compensation awards in the event of their injury and the city is held responsible.

PROXY VOTING

(No. 10835—President, Board of Health—F. V. M.—February 8, 1945.)

At regular meetings of the Advisory Committee of the Board of Health, votes may not be cast by proxy for absent members, even if the majority of those present so desire.

Citations:

Ordinances: Municipal Code, Secs. 98-34, 98-34.3.

Cases: 107 Ill. 95.
303 Ill. 448.
306 Ill. 402.
321 Ill. 504, 508.

Other references: 2 McQuillin, Mun. Corp. (2d.) par. 625.

OPINION OF FOREGOING SYNOPSIS

We have your letter of January 17, 1945, in which you state that members of the Advisory Committee appointed by you in accordance with authority granted by Section 98-34 as amended cannot attend meetings because of other commitments, especially those concerned with the war effort.

You ask to be advised whether or not at regular committee meetings votes may be cast for absent members by proxy if the majority of those present so desire.

The only section of the code pertaining to the Advisory Committee which authorizes them to act through designated representatives is Section 98-34.3, reading in part as follows:

"98-34.3. Inspection of records.) Records in the Health Department, poundmaster's office and City Clerk's office relative to dogs concerned in this ordinance shall be open for inspection by the members of the Advisory Committee or their designated representatives at all times."

It is a general rule of law that members of regularly constituted boards and committees must meet together and vote on any matter that comes before them for consideration. In this connection we quote from McQuillin Municipal Corporations, Second Edition, Revised Vol. 2, p. 559:

"§ 625 (595). Of boards, commissioners, committees, etc. In the absence of law to the contrary, where authority to do an act of a public nature is given by law to more persons than one, which act is merely ministerial in character, a majority at least must concur and unite in the performance of it; but they may act separately and need not be convened in a body or notified so to convene for that purpose. However, if the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless provision is otherwise made by law, the persons to whom the authority is given must meet and confer together and be present when the act is performed, * * *"

We quote further from the case of *Bellwood v. Galt*, 321 Ill. 504, 508:

* * * "The board of local improvements is a body to which are committed not only the initiation of all public improvements to be made by special assessment or special taxation, but also important duties in regard to the making of contracts for the construction of such improvements and the performance of such contracts. Official action of such a body can be taken only by a majority of its members meeting together and acting officially. (*People v. Chicago and Eastern Illinois Railway Co.*, 306 Ill. 402; *McKeown v. Moore*, 303 *id.* 448; *McManus v. McDonough*, 107 *id.* 95.) * * *"

We are therefore of the opinion that at regular committee meetings, despite the desire of the majority, votes may not be cast for absent members by proxy.

TRAINEE PATIENTS

(No. 10838—*Superintendent, Municipal Tuberculosis Sanitarium—F. V. M.—March 21, 1945.*)

The Municipal Tuberculosis Sanitarium cannot legally accept funds earmarked as tuition fees on behalf of trainee patients from the State Department of Rehabilitation and pay the money to the trainee patients for any purpose.

Citation: IRS '43. Art. 72 et seq. (p. 466.)

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of March 14, 1945, in which you state that the Municipal Tuberculosis Sanitarium has for several years operated a School for Laboratory Technicians where patients, whose physical condition warranted, have been trained.

You further state that while training, these patients received no compensation, although they did a certain amount of work for the Institution, and that at the present time, with the existant shortage of technical help, you could use a much larger number of these patients to help carry on the work; that they feel, however, that they are entitled to some compensation, at least sufficient to cover the expense of replacing clothing, shoes, etc., damaged by acids, reagents and chemicals in the course of the work.

You state that as the Sanitarium has no way of compensating these patients, the matter was taken up with the State Department of Rehabilitation, which has agreed to pay a tuition fee of perhaps \$250.00 to \$300.00 per year for each trainee, and that the Sanitarium would like to turn this money over to the trainee in compensation for clothing damaged in the course of the work.

You ask for an opinion on the following questions in this connection:

(1) Can the Sanitarium legally turn this money over to the trainee patients?

(2) Would the Sanitarium, under the Workmen's Compensation Act, be liable for any injuries, damages or industrial disease incurred while taking the course?

A complete answer to question no. 1 must include an interpretation of Article 72 of the Cities and Villages Act, Illinois Revised Statutes, 1943, p. 466, as it applies to the following:

- (1) The maintenance of a School for Laboratory Technicians.
- (2) The collection of tuition on behalf of the trainee patients.
- (3) The payment of the money received for tuition to the trainee patients.

The foregoing will be taken up in the order named.

(1) Section 72-1 of the Act reads in part as follows:

"§ 72-1. May establish public tuberculosis sanitarium—Tax levy.)
The corporate authorities of every city and village have the power, in

the manner provided in this article, to establish and maintain a public sanitarium and branches, dispensaries, and other auxiliary institutions connected therewith within or without the corporate limits of the city or village, for the use and benefit of the inhabitants of the city or village for the treatment and care of persons afflicted with tuberculosis. * * *

Unless the school is maintained as an auxiliary institution in connection with the treatment and care of persons affected with tuberculosis, its maintenance is in violation of this section. In other words if the purpose of the school is to train technicians and such training has nothing to do with the treatment and care of the trainee patients, its operation is not within the scope of the act.

(2) We quote from Section 72-7 of the Act as follows:

"§ 72-7. Sanitarium to be free to inhabitants—Regulations—Extension of benefits.) Every sanitarium established under this article shall be *free* for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis. * * *"
(Italics ours.)

The collection of tuition for the service rendered by the school from whatever source is in violation of the foregoing section in that such service is not free.

(3) Section 72-6 is in part as follows:

"§ 72-6. * * * They have the exclusive control of the expenditure of all money collected to the credit of the 'Tuberculosis Sanitarium Fund.' All money received for the sanitarium shall be deposited in the municipal treasury to the credit of the 'Tuberculosis Sanitarium Fund,' and shall not be used for any other purpose. It shall be drawn upon by the proper municipal officer upon the properly authenticated vouchers of the sanitarium board." * * *

Section 72-9 is in part as follows:

"§ 72-9. Donations—Monthly reports.) The board of directors, in the name of the city or village, may receive from any person any donation of money or property. The board shall pay over to the municipal treasurer all money thus received as often as once in each month and shall take the treasurer's receipt therefor. * * *"

If tuition could legally be accepted on behalf of the trainee patients, in accordance with the foregoing sections the funds accepted for this purpose would have to be deposited in the municipal treasury and could only be expended for sanitarium purposes, and the payment of these funds to the trainee patients would be in violation of the statute.

We are therefore of the opinion that the sanitarium cannot legally accept funds earmarked as tuition fees on behalf of the trainee patients and pay said money to the trainee patients for any purpose.

In answer to question no. 2 we first quote from the Workmen's Compensation Act, Illinois Revised Statutes, 1943, p. 1586:

"142. Term 'employee' defined.) § 5. The term 'employee' as used in this Act, shall be construed to mean:

"First—Every person in the service of the State, including all persons in the service of the University of Illinois on or after January 25, 1933 except members of the instructional, research, and admin-

istrative staffs thereof when not, at the time of the injury, actually engaged in an occupation declared to be extra-hazardous in Section Three (3) of this Act, county, city, town, township, incorporated village or school district, body politic, or municipal corporation therein, *under appointment or contract of hire, express or implied, oral or written, * * ** (Italics ours.)

We also quote from the Occupational Diseases Act, Ill. Rev. Stat. 1943, par. 172.5, sec. 5, p. 1604, as follows:

"172.5. Terms defined.) § 5. For the purposes of this Act: * * *

"The term 'employee' as used in this Act, shall be construed to mean:

"First—Every person in the service of the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation therein, *under appointment or contract of hire, express or implied, oral or written, * * **" (Italics ours.)

We are therefore of the opinion that the trainee patients referred to as such are not "employees" as above defined and unless required to perform some service, the basis of which may be interpreted as an implied appointment or contract of hire, the sanitarium would not be liable under the terms of these acts for any injuries, damages or industrial disease incurred by the trainee patients while taking the course in question.

DAY NURSERY

(No. 10839—President, Board of Health—F. V. M.—March 28, 1945.)

A day nursery in which there are sleeping accommodations for more than ten individuals falls within the provisions of the Municipal Code regarding institutional buildings and the Board of Health may not issue a permit therefore until the building and fire departments have advised that the building meets all of the provisions of the Municipal Code.

Citations: Municipal Code, Secs. 40-5, 158-1, 158-7.

OPINION OF FOREGOING SYNOPSIS

You state that the Health Department has not, to your knowledge, entered into any consideration or discussion of the question raised by Mr. Rissman concerning Chapter 40, Section 5. You state further that you have consistently taken the position that you could not issue a permit to a day nursery until the Building and Fire Departments have advised you that the applicant meets all the provisions of the Municipal Code, coming within their respective jurisdictions.

Because Mr. Rissman states, "I would appreciate your procuring an opinion from the Corporation Counsel's Office with regard to a proper interpretation of the section herein quoted as affecting pre-kindergarten

schools as differentiated from nurseries, convalescent homes or other institutional buildings' as defined by Chapter 40, Section 5," you ask for an opinion such as he requests.

In reply thereto we first quote Section 40-5 of the Municipal Code of Chicago:

"40-5. An institutional building is hereby defined as a building, or part of a building designed, intended or used for a place in which sick or injured are given medical and surgical treatment and care, including a hospital, sanitarium, medical unit, infirmary, or other similar unit for the care of treatment of men, women, or children, a home or asylum for bedridden or decrepit persons, the blind, the aged, children, or the insane, or a nursery or day nursery for infants and in which there are sleeping accommodations for more than ten individuals." (Italics ours.)

Webster's Dictionary defines the word "infant" as follows: (Webster's New International Dictionary, Second Edition)

"1. Of or pertaining to, or being in, infancy; in or pertaining to early development; immature; tender.

"2. Intended for young children; as, an infant school."

We note from Mr. Rissman's letter that the minimum age of a child taken by the kindergarten schools operated by his clients is two and one-half to three years of age, and in our opinion this brings these institutions within the definition of "day nurseries" as set out in the following section of the Municipal Code of Chicago:

"158-1. The term 'day nursery' is hereby defined as an institution or a place in which are received at one time for periods of over four hours, but not exceeding twenty-four hours, three or more children under the age of fourteen years and not of common parentage for nursing or care apart from their parents, whether for compensation, reward, or otherwise."

Day nurseries for infants, as they are referred to therein, in which are sleeping accommodations for more than ten individuals are included in the definition of an institutional building as set out in Section 40-5 of the Municipal Code heretofore quoted.

Section 158-7 of the Municipal Code requires that day nurseries must provide cribs or beds for the children accommodated therein. Therefore, in accordance with all of the foregoing if the pre-kindergarten schools referred to by Mr. Rissman are accommodating more than ten individuals we are of the opinion that Section 40-5 of the code applies to these institutions.

CITY DAY NURSERIES

(No. 10843—President, Board of Health—F. V. M.—May 5, 1945.)

The operation of day nurseries by the Board of Education made it the duty of the Health Department to make sure that the nurseries conform to all building and fire regulations.

Citations:

Statutes: IRS '43, ch. 122, sec. 128.

Ordinances: Municipal Code 40-5, 49-1, 158-13.

Case: 171 Ill. 332, 334.

OPINION OF FOREGOING SYNOPSIS

We have your letter of May 2, 1945, in which you quote Section 158-2 of the Municipal Code of Chicago applying to day nurseries and state that at present there are being operated in Chicago a number of day nurseries under the sponsorship of the Board of Education, and that the question arises whether or not these day nurseries are required by this section of the Municipal Code to obtain permits from the Board of Health.

You ask, if such permits are not required, would it still be the duty of the Health Department to make sure that these nurseries conform to all building, fire and health regulations, and should some disaster occur in one of these day nurseries conducted under the sponsorship of the Board of Education, on whom would the responsibility be placed?

In order to advise you whether or not the Board of Education is required to obtain permits from the Board of Health to operate day nurseries, we must first determine if the Board of Education is one of the regularly constituted authorities which are excepted from the operation of Section 158-2 which reads as follows:

"It shall be unlawful for any person other than the regularly constituted authorities of the United States, the state, the county, or the city to conduct or operate a day nursery within the city without first having been granted a permit therefor."

Section 128 of Chapter 122, page 2911, Ill. Rev. Stat. 1943, provides for the Board of Education in the following language:

"Each city having a population exceeding 500,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a board of education, which shall be a body politic and corporate, by the name of 'Board of Education of the City of.....', * * *"

In the case of *Kinnare v. City of Chicago*, 171 Ill. 332, 334, the court, in referring to the Board of Education, had the following to say:

* * * "It therefore appears the appellee board is a corporation or quasi corporation created, *nolens volens*, by the general law of the State to aid in the administration of the State government, and charged, as such, with duties purely governmental in character. It owns no property, has no private corporate interests, and derives no special benefits from its corporate acts. It is simply an agency of the State, having existence for the sole purpose of performing certain duties, deemed necessary to the maintenance of 'efficient system of free schools' within the particular locality in its jurisdiction. * * *"

We are therefore of the opinion that the Board of Education is a regularly constituted authority of the state, and therefore may operate a day nursery without having been granted a permit therefor.

It being our opinion that the Board of Education is not required to apply for permits for the operation of day nurseries, the next proposition to be considered is whether or not these day nurseries must comply with the building, fire and health regulations of the Municipal Code.

We first quote Section 49-1 of the Municipal Code of Chicago:

"Every building or part of a building, designed, erected, altered, or converted for use as an institutional building, as defined in section 40-5, shall comply with the general provisions of this code pertaining to buildings and in addition shall comply with the special provisions set forth in this chapter."

Section 40-5 reads as follows:

"An institutional building is hereby defined as a building, or part of a building designed, intended or used for a place in which sick or injured are given medical and surgical treatment and care, including a hospital, sanitarium, medical unit, infirmary, or other similar unit for the care or treatment of men, women, or children, a home or asylum for bedridden or decrepit persons, the blind, the aged, children, or the insane, or a nursery or day nursery for infants and in which there are sleeping accommodations for more than ten individuals." In addition to the foregoing, Section 158-6 provides in part as follows:

"* * * The building or buildings used as a day nursery shall comply with the building provisions and fire regulations of this code applicable thereto."

Section 158-13 is as follows:

"Any person violating any of the provisions of this chapter shall be fined not less than ten dollars and not more than two hundred dollars for each offense. If any person conducting or operating a day nursery shall be found guilty of a violation of any of the provisions of this chapter relating to the safety of or the accommodation for the children, it shall be the duty of the board of health, and it hereby is authorized, to close such day nursery and keep it closed until such repairs or alterations shall have been made as will make it comply with the provisions of this chapter."

In view of the foregoing it is our opinion that it is the duty of the Health Department to make sure that nurseries operated by the Board of Education conform to all building, fire and health regulations.

In the event of a disaster occurring in one of these day nurseries conducted under the sponsorship of the Board of Education, responsibility therefor would depend upon circumstances in each particular case.

NON-RESIDENTS

(No. 10844—Board of Directors, Municipal Tuberculosis Sanitarium—
E. R. H.—May 16, 1945.)

Veterans residing outside the State of Illinois are not eligible for admission to the Municipal Tuberculosis Sanitarium.

Citation: IRS '43, ch. 24, sec. 7.

OPINION OF FOREGOING SYNOPSIS

With reference to the letter of Col. W. A. Colton, Chief Medical Officer of the Veterans Administration, Hines, Illinois, dated April 16, 1945 and

referred to this office at your meeting of May 15, 1945, concerning contracts for the care of tubercular veterans by the Municipal Tuberculosis Sanitarium, please be advised that section 7, chapter 24 of the Illinois Revised Statutes 1943 provides:

"Every sanitarium established under this article shall be free for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis. They shall be entitled to occupancy, nursing, care, medicines and attendance according to the rules and regulations prescribed by the board of directors of the sanitarium. The sanitarium always shall be subject to such reasonable rules and regulations as the board may adopt in order to render the use of the sanitarium of the greatest benefit to the greatest number, and the board may exclude from the use of the sanitarium those inhabitants and other persons who wilfully violate these rules and regulations. No person so afflicted may enter the sanitarium or any of its branches, dispensaries, or other auxiliary institutions without first giving his written consent, or in case of a minor or one under a disability, the written consent of the parents, guardian or conservator, as the case may be.

* * * *

"The board may extend the privileges and use of the sanitarium and treatment to afflicted persons who reside outside of the city or village but in this State, upon such terms and conditions as the board may prescribe by its rules and regulations."

Under the above law veterans residing outside the State of Illinois are not eligible for admission to the Municipal Tuberculosis Sanitarium.

MILK PERMITS

(No. 10850—President, Board of Health—F. V. M.—July 23, 1945.)

A factory does not have to obtain a milk distributor's license to secure milk for resale to its employees.

Citations:

Ordinances: Municipal Code, 154-4, 154-8.

Other reference: Amend. Coun. J., 12-15-43, p. 984; 12-18-43, p. 1018; 12-29-43, p. 1026.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of July 19, 1945, in which you state that an application has been received from a Chicago company for a milk distributor's permit, and that the application states that milk is to be secured from milk stores throughout the city.

You state further that it is the usual and customary thing for milk distributors, who are known as itinerant vendors, to secure their supplies from licensed milk plants operating under milk plant permits issued by the Board of Health.

You raise the question whether it is legal for retail stores, under the ordinance and regulations of the Board of Health, to supply such itinerant

vendors or milk distributors for the reason that they are not licensed milk plants and hold no permit from the Board of Health, and ask to be advised whether the Board of Health can legally issue a milk distributor's permit on the application thus received, after compliance as to the vendor's vehicle has been met.

Section 154-8 of the Municipal Code of Chicago is in part as follows:

"154-8. It shall be unlawful for any person to bring into or receive into the city, for sale, or to sell or to offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product unless such person possesses a permit from the board of health, and on his vehicle there appears in a conspicuous place the name and address of the milk distributor and the permit number and such other identification in such manner as required by the board of health. * * *

We assume that the permit referred to by you is that provided for in the foregoing section. This section contains no proviso as a condition precedent to the issuance of such permit that the applicant must secure his supply of milk from licensed milk plants operating under milk plant permits issued by the Board of Health, and therefore the applicant having stated in its application that milk is to be secured from milk stores throughout the city, and in the absence of a rule or regulation to that effect the question of the legality of such retail stores supplying such milk should not interfere with the issuance of such a permit.

From the language of Section 154-8 it is apparent that the permit provided for therein is to be issued to a vendor whose product is distributed by means of a vehicle of some kind.

You verbally advise us that the milk to be handled by the company is to be delivered to a restaurant owned by the applicant for consumption by its employees and in your letter direct our attention to Section 154-1 reading in part as follows:

"Milk distributor. The term 'milk distributor' is hereby defined to mean any person who offers for sale, or sells, or delivers to another, any milk or milk products for human consumption."

Section 154-4 is in part as follows:

* * * "Every person selling, offering for sale, exposing for sale, exchange, or delivery, or disposing of milk or milk products, which is not intended to be consumed on the premises, in and from any milk plant, such as a milk depot, store, stand, booth, market place, or any building or enclosure or establishment of a similar character shall pay an annual license fee of five dollars.

"A single of (or) 'combination' license may be issued to an applicant to permit him to conduct or operate the business of food purveyor and to sell milk and milk products at retail, not for consumption on the premises, in conjunction with such business of food purveyor on the same premises. This provision shall not apply to licenses for milk plants or milk receiving stations. The fee to be paid for such single or 'combination' license shall equal the sum of fees which the applicant would be required to pay if separate licenses for each business were issued to him. (Amend. Coun. J. 12-15-43, p. 984; 12-18-43, p. 1018; 12-29-43, p. 1026)."

In our opinion it is not necessary for the company to obtain a milk distributor's license. The foregoing paragraphs of Section 154-4 are applicable to the operations of the company in the sale of milk, and in this

connection you are also advised that Section 154-4 in no way establishes any limitation as to whom the owner of a retail store may sell the product distributed by him and it is not illegal for the owner of a retail store to sell milk to milk distributors or other vendors of milk.

MILK STANDARD

(No. 10862—President, Board of Health—F. V. M.—October 19, 1945.)

No statement by the milk industry that an emergency exists can justify any deviation from the ordinances of the City of Chicago regarding the grade of milk and cream allowed to come into the city for use here.

Ordinance: Municipal Code 139-8.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of October 9, 1945, in which you state that the Health Department has been advised by the milk industry that a serious shortage of milk and milk products exists in the Chicago milk supply; that some of the Chicago milk distributors are putting up large orders of milk and milk products daily for the Army and Navy whose contracts specify that only grade A milk and milk products may be accepted.

You advise us further that representatives of the milk industry have stated that because of the removal of restrictions by the United States War Food Administration on the sale of heavy cream and also with respect to the use of cream in the manufacture of ice cream, the demands for these products have resulted in a shortage of cream especially; that the milk industry has requested permission to bring cream into Chicago from uninspected sources, to be used in the manufacture of ice cream, the receipt, transportation and processing of said products to be under the supervision of your department.

You ask to be furnished with an opinion as to whether or not a statement by the milk industry that an emergency exists would justify the Health Department in complying with the request of the industry for permission to bring cream into Chicago from uninspected sources for ice cream manufacture.

Section 139-8 of the Municipal Code of Chicago reads in part as follows:

“* * * All milk and cream used for the manufacture of ice cream or similar products, sold, or offered for sale in the city shall be pasteurized and comply in other respects with the standards for milk and cream as defined by this code.”

Under the terms of the foregoing section of the code milk or cream which is not pasteurized or does not comply in other respects with the standards of milk and cream as defined in the code may not be used in the manufacture of ice cream which is to be sold in the City of Chicago. No statement by the milk industry that an emergency exists can alter the

situation and the Health Department's compliance with the request of the industry for permission to bring cream into Chicago to be used in the manufacture of ice cream to be sold in the City of Chicago which does not comply with the ordinances of the City, would be a direct violation of the laws pertaining to the manufacture of ice cream.

HEALTH RULES

(No. 10864—President, Board of Health—F. V. M.—October 20, 1945.)

The rules and regulations adopted by the Illinois Department of Public Health should be enforced by the Chicago Board of Health.

Citations:

Statute: IRS, '45, Ch. 111½ (p. 2574).

Ordinance: Municipal Code, 9-13, 94.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of October 26, 1945, in which you state that the Illinois Department of Public Health recently has published a booklet, a copy of which you enclose, containing "Rules and Regulations for the Control of Communicable Diseases—Revised and in force throughout Illinois, September 1, 1945," and that at a meeting of the Board of Health on October 18, 1945, these rules and regulations were adopted by the Board.

You write to inquire whether this action of the Board is legal and if not what action would meet the legal requirements.

We first quote from the Illinois Revised Statutes, 1945, Chapter 111½—Public Health—p. 2574, reading a part as follows:

"22. Power of department.) § 2. The State Department of Public Health has general supervision of the interests of the health and lives of the people of the State. It has supreme authority in matters of quarantine, and may declare and enforce quarantine when none exists, and may modify or relax quarantine when it has been established. The Department may make such rules and regulations and such sanitary investigations as it may from time to time deem necessary for the preservation and improvement of the public health, and may regulate the transportation of the remains of deceased persons. All local boards of health, health authorities and officers, police officers, sheriffs, constables and all other officers and employees of the state or any county, village, city or township thereof, shall enforce the rules and regulations so adopted. * * *

Under the foregoing section of the statute it becomes the duty of the Board of Health to enforce the rules and regulations promulgated by the Illinois Department of Public Health and the rules and regulations for the control of communicable diseases referred to by you come within this category.

Chapter 94 of the Municipal Code of Chicago pertains to "Contagious, epidemic, or communicable disease" and Chapter 9 thereof provides the following:

"9-13. The board of health shall have power to make such rules and regulations, as it may deem necessary or advisable, in relation to the sanitary condition of the city and for the prevention and suppression of disease, not inconsistent with the provisions of this code. Such rules or regulations shall take effect and be in force ten days after publication in a daily newspaper of the city, except in cases of emergency as hereinafter provided."

In view of all of the foregoing it is our opinion that the rules and regulations adopted by the Illinois Department of Public Health should be enforced by your Board and such rules and regulations as are necessary to enforce the provisions of Chapter 94 of the Code (Contagious and Epidemic Diseases) should be adopted by the Board of Health.

In view of the fact that the rules and regulations in question which do not appear to be inconsistent with the provisions of the Municipal Code have already been adopted by the Board, we believe there is no necessity for the rescinding of this action by the Board.

However, if the practice of adopting and publishing identical rules of the State Department of Public Health is continued any slight changes in the rules of the State Department made from time to time may require duplicate revision of the rules of the Board of Health. This is a waste of time and would require unnecessary expenditures of city funds for newspaper publication.

BOARD OF HEALTH

(No. 10870—Secretary, Board of Health—A. F. G.—November 29, 1945.)

The Board of Health has no power to compel a property owner to allow his neighbor to enter upon his premises for the purpose of placing ladders in order to repair roof gutters on an adjoining building.

No References.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of November 8, 1945, to which was attached a letter of even date to Alderman Matt Porten of the 34th Ward.

You state that the owner of the property at 1840 N. Fairfield Avenue desires to place gutters on her building in order to comply with the ordinance of the City, but that the owner of the adjoining property at 1842 will not permit her to place ladders on his property for the purpose of installing the gutters.

You ask if your department has any power whereby it can compel a property owner to permit the owner of an adjoining property to enter upon his premises for the purpose of placing ladders there in order to repair the roof gutters on his own building.

Your department has no power to compel the owner of property to permit the owner of abutting property to go upon his land for the purpose of placing ladders thereon. Such an entry without the consent of the owner would be trespass and subject the trespasser to the penalties of the law.

Your board has power of entry on private property for the purposes and in the manner provided in the ordinances of the City, but this power cannot be delegated to a property owner even for the purpose of aiding him in complying with a health regulation of the municipality.

OUTSIDE EMPLOYMENT

(No. 10885—General Superintendent, Municipal Tuberculosis Sanitarium—F. V. M.—January 23, 1946.)

The maintenance of offices by full time physicians on the Municipal Tuberculosis Sanitarium staff and their engagement in the practice of their profession outside of the institution may be incompatible with the positions they hold with the sanitarium.

Citation: IRS '45, ch. 24, arts. 72, 72-3, 72-6.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of October 27, 1945, in which you state that the Board of Directors of the Sanitarium have asked you to request an opinion as to whether full-time physicians on the Sanitarium staff, according to law, are permitted to have offices and practice on the outside. You state that you would like this information as to both civil service and temporary appointees.

Article 72 of the Cities and Villages Act, Ill. Rev. Stat. 1945, provides in part as follows: (Chap. 24, p. 518.)

72-3. § 72-3. Appointment of directors.) When the corporate authorities of a city or village have decided to establish and maintain a public tuberculosis sanitarium under this article, the mayor or president, with the approval of the corporate authorities, shall appoint a board of three directors, one of whom, in municipalities having a board of health or a public health board, shall be from that board, and the other two from the citizens at large. The directors shall be chosen with reference to their special fitness for that office.

* * * *

72-6. § 72-6. Organization—Powers and duties of directors—Appointees under civil service.) Immediately after their appointment the directors shall meet and organize by the election of one of their number as president and one as secretary and by the election of such other officers as they may deem necessary. They shall adopt such by-laws, rules, and regulations for their own guidance and for the government of the sanitarium and the branches, dispensaries, and auxiliary institution and activities connected therewith as may be expedient, not inconsistent with this article and the ordinances of the city or village. * * *

It is our opinion that the maintenance of offices by full-time physicians on the Sanitarium staff and their engagement in the practice of their profession outside of the institution may be incompatible with the positions they hold with the Sanitarium.

Various situations may arise to account for this incompatibility, as for example the contact of these physicians with patients in your clinic who might be encouraged to seek treatment in the private offices of these same physicians.

Of course we know that you desire your medical staff to be the finest and to render the best medical service for the City of Chicago. Possibly, in order to procure the services of physicians who measure up to this standard it may be necessary to permit them to maintain and attend their private offices outside of the usual Sanitarium hours.

Your Board of Directors, under the authority granted by Section 72-6 heretofore quoted, may adopt rules and regulations for the government of the Sanitarium, and we believe that the maintenance of offices by full-time physicians of your institution and the practice of their profession outside thereof may be prohibited by a rule or regulation.

SIGNING DEATH CERTIFICATE

(No. 10905—President, Board of Health—M. H. F.—July 30, 1946.)

The keeper of the County Morgue should sign death certificates not only in his capacity as morgue keeper, but also as a Deputy Coroner.

Citations:

- Statute: IRS '45, Ch. 31, Secs. 21, 27 to 29. Ch. 91, Pars. 19 to 22.
 Ch. 111½, pars. 36 et seq.
Ordinance: Municipal Code 181-1.
Other Reference: 18 C.J.S. Sec. 25.

OPINION OF FOREGOING SYNOPSIS

Your communication of June 14, 1946 states that you are informed that all unidentified or unclaimed dead bodies in Chicago are held in the Cook County morgue pending their disposition, that the morgue keeper disposes of these dead bodies by causing some of them to be buried in Oak Forest Cemetery, while others are transferred to the Demonstrators' Association of Illinois, to be used for scientific purposes. You also state that in order to obtain permission to move these unclaimed or unidentified bodies the morgue keeper signs his name on the death certificate in the space provided for the funeral director, although he is not licensed as an undertaker by the City of Chicago. Inviting our attention to Section 181-1 of the Municipal Code of Chicago, you request our opinion as to whether the keeper of the Cook County morgue has the legal right to sign death certificates as an undertaker.

Section 181-1 of the Code is a part of the city's ordinance licensing and regulating undertakers. It reads as follows:

"It shall be unlawful for any individual to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an undertaking room, store, or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, without first obtaining a license as an undertaker."

The state act in relation to the registration of births and deaths, approved June 22, 1915, as amended, (Par. 36 et seq., Chapter 111½, Illinois Revised Statutes 1945) provides for the establishment of registration districts, the designation of local registrars, and by Section 5 relating to burial permits provides in part that no burial or removal permit shall be issued by any registrar until, whenever practicable, a complete and satisfactory certificate of death has been filed with the registrar. Section 7 prescribes that the certificate of death shall contain at least the items of the Standard Certificate of Deaths, approved and adopted by the United States Bureau of the Census; that the personal particulars shall be authenticated by the signature and address of the informant who shall be the nearest of kin or other competent person acquainted with the facts, and that the medical certificate shall be made and signed by the legally qualified physician, if any, last in attendance, or by the coroner.

The State Department of Public Health form of death certificate submitted to us contains spaces for the insertion of the date and place of burial, cremation or removal, name and location of cemetery, and the signature, the address, and the license number of the funeral director.

Section 8 of the registration act provides that in case of any death occurring without medical attendance, it shall be the duty of the undertaker or person acting as such to notify the coroner of such death, and that the coroner shall thereupon proceed in accordance with the provisions of the Coroners act. By Section 9 the undertaker or person acting as undertaker is made responsible for obtaining and filing the certificate of death with the local registrar of the district in which the death occurred, and for securing a burial or removal permit prior to any disposition of the body. He is required to obtain the personal and statistical particulars required from the nearest of kin, then present the certificate to the attending physician, if any, or the coroner. The section prescribes that he shall then state the facts required relative to the date and place of burial over his signature and with his address, and present the completed certificate to the local registrar.

Section 21 of the Coroners act (Chapter 31, Illinois Revised Statutes) authorizes the coroner to cause a dead body to be buried by the county in those cases where there are no friends of the deceased to receive the body and there is no property of the deceased from which to pay the burial expenses.

By an act entitled "An Act to promote the science of medicine and surgery in the State of Illinois," approved June 26, 1885 (Pars. 19 to 22 inclusive, Chapter 91, Illinois Revised Statutes, 1945) the coroner of a county, in whose custody the body of any deceased person required to be buried at public expense shall be, is authorized to give permission to certain physicians or surgeons, or to medical colleges, to receive and remove free of charge or expense, after having given proper notice to relatives or guardians of the deceased, the bodies of such deceased persons to be buried at public expense, to be by him or them used within the state for advancement of medical science.

We are informed that the keeper of the Cook County morgue is a deputy coroner appointed by the coroner and duly qualified as such under and pursuant to an act allowing coroners to appoint deputies and prescribe

their duties. Pars. 27 to 29 inclusive, Chapter 31, Illinois Revised Statutes, 1945.)

The office of coroner is a very ancient one at common law, and it is recognized that the duties, powers and functions of coroners remain what they were at common law; indeed, it has been declared that statutes prescribing such powers and duties are in affirmance of the common law. As in Illinois, most of the states of the Union place upon the coroner the duty to cause the body of a decedent who was a stranger or pauper, and no friend or relative appears to claim the body for burial, to be decently buried at the expense of the county wherein the body was found. (18 C.J.S., Section 25, page 302.)

It will be noted that Sections 8 and 9 of the act in relation to the registration of births and deaths, above referred to, employ the language "the undertaker or person acting as such," and "the undertaker or person acting as undertaker," when providing for the making and filing of certificates of death, thus indicating that the legislature did not intend a licensed undertaker to be the only person permitted to cause dead bodies to be buried or to complete the execution and filing of death certificates.

Section 181-1 of the Municipal Code, in our opinion, is not applicable to a deputy coroner who acts as an undertaker for the limited purpose of complying with the state law governing the duties of coroner.

It is believed you should notify the Cook County morgue keeper that your Board will expect him to sign future certificates not only in his capacity as morgue keeper, but as deputy coroner, Cook County, Illinois. When executed in this manner our opinion is that you would be authorized to accept death certificates and issue your burial or removal permits. Likewise, the morgue keeper would be better protected as he would then show that he was functioning for the coroner in the discharge of a legal duty imposed by law upon that official.

TUBERCULOSIS SANITARIUM SALES TAX

(No. 10906—*Superintendent, Municipal Tuberculosis Sanitarium—E. R. H.—August 9, 1946.*)

The Illinois Retailer's Occupation Tax is not applicable to sales of food, medicine, drugs, and supplies used in the treatment of patients at the Municipal Tuberculosis Sanitarium.

Citations:

352 Ill. 441.	381 Ill. 194.
370 Ill. 237.	384 Ill. 283.
374 Ill. 237.	386 Ill. 479.
379 Ill. 169.	317 Ill. App. 370.

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of July 30, 1946 asking for an opinion "as to whether the Sanitarium is responsible to the vendor for the retail occupational sales tax." The tax you refer to is not a sales tax but rather a tax upon dealers for the privilege of engaging in the business of selling personal property at retail.

In the case of *People ex rel. Herlihy Mid-Continent Co. v. Nudelman*, 370 Ill. our Supreme Court said:

"The Retailer's Occupation tax is a tax on the privilege of engaging in the business of selling tangible personal property to purchasers for use or consumption and is not a tax on the property itself."

In *Ahern v. Nudelman*, 374 Ill. 237 the court said:

"The tax is an occupation tax upon a class of vendors and is measured by the gross receipts from their sales. It applies only to sellers and the sale made must be for use of consumption and not for resale."

In *Svithold Singing Club v. McKibbin*, 381 Ill. 194, the court said:

"It is settled that the tax so imposed is an occupation tax upon a class of vendors described in the act, and not a tax upon sales though it is measured by the gross receipts from sales. * * * That those in the business of selling tangible personal property at retail have contrived to pass this tax onto the consumer was neither the intent of the General Assembly, nor within the purpose of the act as shown by its terms."

The case of *People's Drug Shop, Inc. v. Maysley*, 317 Ill. App. 370, affirmed by the Supreme Court 384 Ill. 283, was an action by the Peoples Drug Shop, Inc., against Leslie M. Maysley to recover the amount of retailer's occupation taxes on retail sales of tangible personal property to Maysley. The trial court held that the Peoples Drug Shop, Inc., could not recover and this judgment was affirmed in both the Appellate and Supreme Court. In its opinion the Appellate Court said p. 371—"It is true that the merchant need not absorb the so-called Sales Tax and may pass it on to the customer, but only as part of the sales price, not as a tax on the consumer." Citing *Winter v. Barrett*, 352 Ill. 441; *Vause and Striegel v. McKibbin*, 379 Ill. 169.

In affirming the Appellate Court's opinion in the Peoples Drug Shop case the Supreme Court said, p. 285:

"The sole question presented for decision is whether a person engaged in selling tangible personal property at retail may collect from the consumer the retailer's occupation tax when added, as here, as a separate and distinct charge to the agreed price of merchandise sold. Defendant neither expressly nor impliedly agreed to pay the tax added. On the other hand, it affirmatively appears that he consistently refused to pay the additional charge and plaintiff continued to sell him merchandise despite his continued refusal."

After referring to a number of its decisions on the subject the court said, p. 287:

"Unambiguous provisions of the Retailers' Occupation Tax Act proclaim, and the decisions of this court uniformly hold, that the tax imposed is upon retailers and not upon consumers, and that the sole duty of paying the tax rests upon the former. It follows necessarily that plaintiff was without legal authority to collect from its customer, the defendant, the challenged items in its invoices representing additional charges for retailers' occupation tax."

In the absence of any agreement on the part of the Sanitarium to assume this tax as a part of the purchase price of merchandise bought by it it is our opinion that the Sanitarium is not required to pay such tax.

Moreover, the vendor is not required to pay a tax on all commodities sold to and used by the Sanitarium. The tax is not applicable to food, medicine, drugs and supplies used in the treatment of hospital patients. *Huston Brothers Co. v. McKibbin*, 386 Ill. 479.

OUTSIDE EMPLOYMENT BY M. T. S. PHYSICIANS

(No. 10920—*Superintendent, M. T. S.—E. R. H.—October 14, 1946.*)

Unless there is a rule to the contrary, it is lawful for physicians of the Municipal Tuberculosis Sanitarium to work on their days off and accept compensation therefor.

Citation:

Ordinance: Municipal Code, 72-6.

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of September 17, 1946, for an opinion as to whether it is lawful for your physicians to serve at Edward Hines, Jr., Hospital on their days off, and also, in some cases, taking additional time off to attend there, receiving \$25.00 per day for their services at Hines Hospital, if they are carried on the Sanitarium payroll at the same time.

It is our opinion that unless you have a rule prohibiting it, it is lawful for your physicians to practice their profession outside of the time they are required to be on duty at the Sanitarium and to accept compensation therefor from any person or from the Federal Government or any other governmental agency.

Your Board of Directors has power to make rules and regulations with reference to employment of your physicians and we refer you to our opinion of January 23, 1946 to you, on a similar subject, wherein we said:

"Your Board of Directors, under the authority granted by Section 72-6 heretofore quoted, may adopt rules and regulations for the government of the Sanitarium, and we believe that the maintenance of offices by full-time physicians of your institution and the practice of their profession outside thereof may be prohibited by a rule or regulation."

FAULTY VISION OF SCHOOL CHILDREN

(No. 10929—*President, Board of Health—F. V. M.—December 3, 1946.*)

The Board of Health is without authority to take any action to compel the treatment of children in the City's Public Schools who have faulty vision and whose parents refuse to give them corrective treatment.

Citations:

Statute: IRS '45, ch. 38, Secs. 42, 53, 95.

Ordinance: Municipal Code, 9-18.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of November 22, 1946 with attached photostatic copies of correspondence received from Don C. Rogers, assist-

ant superintendent in charge of elementary schools, together with a copy of your reply which you state is self-explanatory.

You asked to be advised whether or not the Health Department is empowered, under the law, to take any action to bring about correction of medical defects in a child or adult when such defect is not an apparent or potential hazard to other persons, if the person or parents or guardians of the person having such defect refuse to obtain adequate medical care.

The substance of the correspondence which is enclosed has to do with two pupils in the Kenwood School both of whom have very poor eyesight. The school authorities have written to the mother of these children and talked about the girls' need for glasses but the mother, who is a health faddist, insists that there is nothing greatly wrong with her daughters' vision and that any slight weakness she will correct with diet.

In reply to your request, we first quote from Section 9-18 of the Municipal Code of Chicago.

"9-18. The board of health shall not pass any rule or regulation which will compel any person to submit to vaccination, to the injection of any virus, or to any medication against his will or without his consent, or in the case of a minor or other person under disability, without the consent of his parent, guardian, or conservator, except when there shall be an epidemic of a disease, or an epidemic is or appears to be imminent, and such a rule or regulation is necessary to arrest the epidemic and safeguard the health of the city."

Based upon the foregoing we are of the opinion that the Health Department is without authority to take any action to compel the treatment of the children mentioned to correct their faulty vision.

However, in connection with the lack of treatment of these children we refer you to the following opinion given your department under date of July 20, 1916.

"Hon. John Dill Robertson, Commissioner of Health.

Dear Sir:

I have your letter of July 7, 1916, inquiring as to the duties and powers of the commissioner of health in cases where parents and guardians refuse or neglect to furnish the necessary medical or surgical care for their children, and inquiring particularly regarding the case of a girl two years of age whose parents refused to allow a physician called in to give the proper treatment for a broken leg, and indicating that unless such treatment is given there will be a serious deformity.

Ample provision seems to have been made by the state in the Criminal Code for cases such as these.

Section 53 of Chapter 38 of Hurd's Revised Statutes of 1915-1916 provides as follows:

'Any person who shall willfully and unnecessarily expose to the inclemency of the weather, or shall in any other manner injure in health or limb, any child, apprentice, or other person under his legal control, shall be fined not exceeding \$500, or imprisoned in the penitentiary not exceeding five years.'

Section 42 of Chapter 38 of Hurd's Revised Statutes of 1915-1916 provides:

'It shall be unlawful for any person having the care or custody of any child, wilfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or wilfully cause or permit such child to be placed in such a situation that its life or health may be endangered.'"

Chapter 38, section 95 of the Criminal Code, Ill. Rev. Stat., 1945, is as follows:

"95. Endangering life or health.) § 4. It shall be unlawful for any person having the care or custody of any child, wilfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or wilfully cause or permit such child to be placed in such a situation that its life or health may be endangered."

If it is your belief that the children's health is being endangered by the attitude of the mother you may take indirect action by referring the matter to the office of the State's Attorney.

M. T. S. PATIENTS

(No. 10930—Superintendent, M. T. S.—A. F. G.—December 9, 1946.)

The Chicago Relief Commission may donate funds and the Sanitarium may accept such donations for treatment of persons by the Sanitarium who are also receiving government relief.

Citation:

Statute: IRS '45, Ch. 24, Secs. 16-2, 72-7, 72-9.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of November 26, 1946, which is as follows:

"In a discussion with Mr. Joseph F. Grossman, 1st Assistant Corporation Counsel, with reference to our budget for 1947, he made the following suggestion as a possible solution to some of our financial problems:

"That patients admitted to the Sanitarium, who have been getting government relief, may be classified as paupers and as such would entitle the Sanitarium to a subsidy from the Chicago Relief Commission or the Public Aid Commission.

"The Board of Directors of the Sanitarium have requested me to write you for an opinion as to whether the Sanitarium might legally accept such a subsidy, provided it could be obtained. They would like that information before going into the matter further."

Section 9 of the Act authorizing the establishment of the Municipal Tuberculosis Sanitarium provides:

"That the board of directors, in the name of the city or village, may receive from any person any donation of money or property." (Sec. 72-9 Revised Cities and Villages Act.)

Under this provision we are of the opinion the Sanitarium might legally accept donations from any proper source. However, Section 7 of the same Act provides:

"Every sanitarium established under this article shall be free for the benefit of the inhabitants of the city or village which established it, if they are afflicted with tuberculosis." (Section 72-7.)

Under that section the Sanitarium is required to furnish hospitalization free of cost to any inhabitant of the city afflicted with tuberculosis whether such person is opulent or indigent. Such obligation, however, is limited by the amount of money made available to the Sanitarium by law.

Section 14a of the Pauper's Act provides that cities, villages and incorporated towns having a population of more than 500,000 inhabitants shall relieve and support all poor and indigent persons lawfully resident therein. By Section 16-2 of the Revised Cities and Villages Act the City of Chicago may levy an annual tax of not to exceed four million dollars for the relief and support of all poor and indigent persons lawfully resident therein and further provides that all money from these taxes shall be paid into a special fund and used only for the purpose for which they are levied.

The Illinois Public Aid Commission is authorized by the Emergency Relief Act to furnish funds for the relief of poor and indigent persons where the maximum amount authorized by law has been levied by the governmental unit charged with the duty of providing relief and the amount so levied is insufficient to furnish relief as required by law.

The duty, therefore, to furnish funds for the hospitalization of a pauper afflicted with tuberculosis, when such care is beyond the financial or physical capacity of the Sanitarium to furnish, is in the City of Chicago up to the maximum amount it may lawfully levy for this purpose and upon the State when the city has exhausted its lawful means to furnish such funds. If the facilities of the Sanitarium to care for paupers afflicted with tuberculosis, when it has reached the limit of its financial capacity to furnish such care, can be extended by the donation of funds by the City or by the State we find nothing in the Pauper's Act or the Illinois Emergency Relief Act that would prevent the city or the state from making donations of relief funds to the Sanitarium for the purpose of enabling that institution to furnish care for persons which otherwise it would be unable to furnish. The duty to care for such persons is primarily the responsibility of the city and the state and so far as the patient, a Chicago resident, is concerned he is getting the service free.

This situation does not appear any different from one where the Welfare Commission places its clients afflicted with tuberculosis in the county hospital. In the latter case pauper funds may be used to pay for hospital services rendered the patient, for the reason that the duty of the county to furnish hospital care for the sick is limited to such as are "by law proper charges upon the county." (Opinion of Corporation Counsel May 8, 1943.) In the other case the sanitarium is limited by lack of funds to furnish the service and we see no reason why the city or state may not supply funds to the Sanitarium to make this service available.

It is our opinion, therefore, that the Chicago Relief Commission may donate funds and the Sanitarium may accept such donations to enable it to extend its services to paupers, without which subsidy the service could not be furnished.

BIRTH REGISTRATION

(No. 10950—President, Board of Health—F. V. M.—March 12, 1947.)

The registrar of vital statistics is without the power to accept a birth certificate for an illegitimate child if item "8 legitimate", thereof is marked "yes", or the name of the father of the child is given on the certificate without his consent when the fact of the baby's illegitimacy is known to the registrar.

Citation: IRS '45, 111½, Pars. 48, 49.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of February 19, 1947 in which you enclose a photostatic copy of a birth certificate for an infant, born January 6, 1947, filed with your office under number 1666, the certificate indicating under item 8 that the child was illegitimate. You quote paragraph 48 of Chapter 111½ of the Illinois Revised Statutes of 1945, reading as follows:

"That the certificate of birth shall contain at least the items of the standard certificate of birth as approved and adopted by the United States Bureau of the Census. *Provided*, that the certificate of birth and record thereof required by this Act, shall not, in the case of an illegitimate child, contain the name of (or) other identifying fact, relating to the father or reputed father or to the mother thereof, without the consent of said father or reputed father to the use of his name, nor the use of the name of the mother without her consent to the use of her name."

You state further that the grandfather of the child named in the above mentioned certificate called at your office and stated that even though the child was illegitimate, he would like to have the certificate bear the name of the father of the child and the information under item 8 on the certificate to show that the child was legitimate; that he further stated that he desired these changes so that there would be no embarrassment to the child in his future years, but was informed by you that in accordance with the above mentioned paragraph 48, Chapter 111½ of the Illinois Revised Statutes that it was your opinion that this could not be done.

You further quoted him as having stated that the physician who signed the original certificate of birth had told him that he was willing to sign a newly prepared certificate of birth showing the name of the father of the child and the information that the child was legitimate; that this certificate would then be submitted in lieu of the certificate now on file, the grandfather believing that under Paragraph 49, Chapter 111½ of the Illinois Revised Statutes such changes in the certificate would be permissible.

Paragraph 49 has to do with the amendment of certificates already on file where it is shown that errors appear in such certificates, but such amendment can only be made with the approval of the Department of Public Health.

You asked to be advised as to whether or not the registrar of vital statistics has the power to accept a birth certificate for an illegitimate child if item "8 Legitimate" thereof is marked "yes", or if the name of the

father of that child is given on the certificate without his consent when the fact of the baby's illegitimacy is known to the registrar.

It is our opinion that the registrar of vital statistics is without the power to accept a birth certificate for an illegitimate child if item "8 Legitimate" thereof is marked "yes", or the name of the father of that child is given on the certificate without his consent when the fact of the baby's illegitimacy is known to the registrar.

VACCINATION

(No. 10951—President, Board of Directors, M. T. S.—F. V. M.—March 12, 1947.)

The City of Chicago and the Board of Directors of the Municipal Tuberculosis Sanitarium cannot be held liable for injury or damage that might result from inoculations of tuberculosis vaccine to children in the City of Chicago.

Citations:

Cases: 165 Ill. 371.
182 Ill. 135.
228 Ill. 134.
231 Ill. 223.
105 Ga. 312.
250 Pa. 184.

Other references: 18 Op. Corp. Coun. 909, 19 Op. Corp. Coun. 475.
19 Op. Corp. Coun. 331, 2 Dillon 4th Ed. Sec. 977.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of February 13, 1947, in which you state that for the past nine years the Municipal Tuberculosis Sanitarium has been conducting a program for the immunization of people against tuberculosis with a culture of living tubercle bacilli called the Bacillus of Calmette and Guérin of B.C.G.; that the vaccine as prepared in the Tice Clinic has been proven to be completely harmless and incapable of producing a tuberculosis lesion except at the site of the inoculation.

You state, however, that the possibility of human error cannot be completely ruled out and that regardless of all safeguards there remains the remote possibility of contamination of a B.C.G. culture with virulent tubercle bacilli and that such an accident actually happened on one occasion in Luebeck, Germany and was followed by the death of a number of children who had been vaccinated with contaminated vaccine.

You asked to be advised whether in the event of a disaster such as occurred in Germany were to follow the administration of vaccine produced under the administration of the Board of Directors of your institution, as to what should be the responsibility, if any, of the Board of Directors and whether or not the individual members of the Board, the Municipal Tuberculosis Sanitarium or the City of Chicago could be held liable for damages thus created.

In an opinion of this office dated April 1, 1936 (Vol. XIX, Page 475, Opinions of the Corporation Counsel and Assistants) we had this to say:

"Hospitals, dispensaries, asylums, poor houses, and other charitable institutions to care for the sick, dependent, neglected, destitute, insane, or poor which are conducted by a municipality are not liable for personal injuries caused by the negligence of their agents or servants, in the absence of negligence in the selection of those agents or servants. Therefore, the Municipal Tuberculosis Sanitarium is not liable for the destruction of a glass eye by an X-ray machine operated by sanitarium employees."

In another opinion from this office dated August 14, 1934 (Vol. XVIII, No. 8490, page 909) we said:

"The city is not liable for the costs of private medical care required by a child who has been improperly inoculated for diphtheria by a city physician, and the City Council has no power to appropriate or expend public funds for this purpose."

Citations:

Cases: *Chicago v. Seben*, 165 Ill. 371 (1897).
Chicago v. Williams, 182 Ill. 135 (1899).
Evans v. City of Kankakee, 231 Ill. 223 (1907-8).
Tollefson v. City of Ottawa, 228 Ill. 134 (1907)."

In the case of *Howard v. Philadelphia*, 250 Pa. 184, the Court said:

"Opinion by Mr. Justice Stewart, July 3, 1915: The health authorities of the City of Philadelphia established a quarantine in a certain district within the city limits in which plaintiff resided because it was infected with small pox. The authorities proposed to relieve from the restrictions of the quarantine such of the inhabitants as submitted to vaccination. The plaintiff submitted and was vaccinated by a physician employed by the Board of Health without expense to himself. His vaccination was negligently performed, and as a result another and different infection was introduced into his system, which after some months became so localized and virulent that amputation of one of his limbs became necessary. * * *

"As little can it be contended that in doing what it did it was exercising a corporate function for the private advantage and benefit of its inhabitants. 'The power or even duty on the part of a municipal corporation to make provision for the public health and for the care of the sick and destitute appertains to it in its public and not corporate, or as it is sometimes called, private capacity.' 2 Dillon on Mun. Corp. (4th Ed.), Section 977. The rule with respect to municipal exemption where a negligence is claimed in cases like the present, is thus stated in the editor's note to the case of *Evans v. The City of Kankakee*, 231 Ill. 223, on p. 1190, L.R.A., Vol. XIII, N.S. 'A municipality is not liable to respond in damages for injuries occasioned through the neglect, incompetence, or wrongful act of its duly appointed officers in enforcing sanitary regulations to prevent the spread of contagious diseases, as the act of such officer or board is the exercise of a governmental or legislative function, rather than one arising from the grant of a special power, in the exercise of which the municipality is the same as a legal individual. . . . The weight of authority holds that in executing such legislative or governmental function as the enforcement of sanitary regulations to prevent the spread of a contagious disease by assuming the care and custody of a person affected, the municipality acts as a quasi sovereignty, and is not responsible for the negligence or nonfeasance of its officers or agents.' The authorities the editor cites are drawn from a wide field, and show how general the rule as stated by him obtains. It is clear beyond question that

the negligence here complained of does not fall within the exception to the general rule in regard to municipal exemption, and that the general rule as above stated here governs. The assignments of error are overruled and the judgment is affirmed."

In the case of *Wyatt v. City of Rome*, 105 Ga., 312, the court said on page 314 the following:

" * * * The city in the present case was in the exercise of a most important function of government in which not only the inhabitants of the city but the public at large were interested. The measure in question which it adopted looked to the prevention of the spread of a contagious and serious malady with which it was at the time perhaps threatened. To allow any citizen a right of action on account of injuries real or supposed that he may have suffered in the interest of the public good would be to paralyze the arm of the municipal government, and either render it incapable of acting for the public weal, or would render such action so dangerous that the public evil consequences to it, resulting from the multiplicity of suits, might be as great as the smallpox itself. Hence the wisdom of the law in exempting it from liability on such an alleged injury as is set forth in the petition."

In our opinion neither the City of Chicago nor the Board of Directors of the Municipal Tuberculosis Sanitarium under the circumstances stated could be held responsible.

"A municipal officer is not liable to private suit for his acts done with care in the honest performance of his corporate duties." (Vol. XIX, No. 9730, dated Dec. 22, 1937, page 331.)

We are further of the opinion that the individual members of the Board could not be held liable under the circumstances.

HOSPITAL FRONTAGE CONSENTS

(No. 10954—President, Board of Health—F. V. M.—March 24, 1947.)

Where frontage consents for the operation of a hospital are on file and the building has been continuously operated as a hospital it is not necessary for the new owner of the hospital to obtain new frontage consents.

Citations:

Ordinance: Municipal Code, 137-8.

Case: 162 Ill. 494.

Other reference: 18 Op. Corp. Coun. 578 No. 7581.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of February 20, 1947 with attached letter from Thomas Rosenberg, attorney at law, representing the Roosevelt Memorial Hospital, Inc., 716 Wellington Avenue.

You state that on February 11, 1947, your department received a request from the License Bureau for investigation, report and recommendation of your department regarding an application for a license to conduct a hospital at 716 Wellington Avenue, Chicago, which application was submitted to the License Bureau by the Roosevelt Memorial Hospital, Inc.

According to your records it appears that a hospital had been conducted by Dr. William T. Kenner on these premises from 1936 to September 30, 1946, and that said hospital had been approved by the Board of Health for a license for that period of time, inasmuch as such hospital had been inspected and found to comply with the ordinance and the rules and regulations of the Board of Health.

You state that frontage consents have not been submitted by the Roosevelt Memorial Hospital, Inc., and for this reason on the recommendation of your Chief Medical Officer, approval of this application for license is withheld, since he is of the opinion that according to Section 137-8 of the Municipal Code of Chicago frontage consents must be obtained by the new applicant.

You state further that when this information was submitted to Mr. Thomas Rosenberg he expressed the opinion that he thought that you were in error as shown by his attached letter.

You ask for an opinion as to whether or not frontage consents must be obtained for the operation of a hospital when the ownership thereof has been transferred, but the license to operate such hospital has not been transferred.

In an opinion of this office dated May 19, 1932 (Opinions of the Corporation Counsel and Assistants, Vol. XVIII, page 578, No. 7581) we had this to say:

"When the necessary frontage consents for installing tanks in a gasoline station have been duly filed with the Fire Department, the tanks installed, and the operation of the filling station legally commenced, the business may be continued without obtaining new frontage consents, despite changes in the leasing or ownership of the property so long as there is no lapse in the operation of the premises as a filling station. *Chicago v. Stratton*, 162 Ill. 494 (1896). Opinions Corporation Counsel (1911-12), page 809, *id.* (1923-24) page 624."

If frontage consents which appertain to the previous operation of this building as a hospital are already on file and the building has been continuously operated as a hospital, it will not be necessary for the Roosevelt Memorial Hospital, Inc., to obtain new frontage consents.

UNDERTAKER'S ASSISTANT SIGNING DEATH CERTIFICATE

(No. 10980—President, Board of Health—M. H. F.—July 2, 1947.)

A duly licensed undertaker may lawfully delegate to his registered assistant the authority to sign a death certificate in the name of the licensed undertaker.

Citation:

Statute: IRS '45, Ch. 111½, Sec. 7.

Ordinance: Municipal Code, 181-1, 181-6, 181-7.

OPINION OF FOREGOING SYNOPSIS

Your communication of June 27, 1947 requests our opinion concerning the following two questions:

1. Has a licensed undertaker the legal power to delegate to some one else the legal right to sign the licensed undertaker's name to a death certificate?

2. Has an undertaker's assistant, who has a certificate issued by the Board of Health, but who holds no undertaker's license, the legal right to sign his own name to a death certificate?

Section 181-1 of the Municipal Code of Chicago, the license required section of the Undertakers ordinance, provides as follows:

"It shall be unlawful for any individual to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage, or be in charge of an embalming room, store, or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation, or otherwise, without first obtaining a license as an undertaker."

Section 181-6 provides for the appointment by a licensed undertaker and registration by the Board of Health, of undertaker's assistants, who are permitted to manage and control a licensed undertaker's establishment, to prepare dead bodies for burial or cremation, other than the embalming by a State licensed embalmer, and to manage or conduct funerals in the capacity of an undertaker from the establishment in which the appointing undertaker is licensed. An assistant is required to possess the same qualifications as are required to be possessed by licensed undertakers.

By Section 181-7 registration certificates of assistants are required to be posted in the undertaker's establishment in the same manner as is provided for the posting of the undertaker's license. Upon leaving the employ of the licensed undertaker the assistant's certificate is to be surrendered to the Board of Health.

We find no provision of the Municipal Code which specifically covers the matter of signing a death certificate.

Section 7 of the State Act relating to the regulation of births and deaths, Chapter 111½, Illinois Revised Statutes, prescribes the contents of certificates of death. Section 9 of the act provides that "the undertaker or person acting as undertaker" shall be responsible for obtaining and filing the certificate of death with the local registrar and for securing a burial or removal permit prior to any disposition of the body. It is made the duty of the undertaker or person acting as undertaker to obtain the personal and statistical particulars required from the nearest of kin, or person best qualified to supply them, and to then present the certificate to the attending physician, if any, or to the coroner, if so directed by the local registrar, for the medical or coroner's certificate of the cause of death and other particulars necessary to complete the record. Then, the section provides, he shall state the facts required relative to the date and place of burial over his signature and with his address, and present the completed certificate to the local registrar.

Inasmuch as the Municipal Code authorizes a registered assistant to manage the undertaking establishment of his principal and to perform certain acts in preparing dead bodies for burial or cremation, and to manage and conduct funerals in the capacity of his licensed principal, and in view of the fact that the State Statute above referred to holds the per-

son acting as undertaker, and not merely the undertaker, responsible for handling and filing the death certificate, our opinion in answer to your first question is that a duly licensed undertaker may lawfully delegate to his registered assistant the authority to sign the death certificate in the name of the licensed undertaker and by himself as such registered assistant.

Answering your second question, and again relying upon the statute which holds the person acting as undertaker, as well as the undertaker, responsible for handling and filing a death certificate, our opinion is that a duly registered assistant may lawfully function in handling the death certificate in the manner prescribed by Section 9 of the State Act and may sign the same in his own name, provided he follows his signature with descriptive words stating that he is the registered assistant to the particular licensed undertaker for whom he is acting, and also sets forth his address, which address should not be different from that of his licensed principal.

As the general law of agency is that whatever a person may lawfully do himself, he may do by his duly authorized agent, and inasmuch as your board is given control over registered assistants as well as licensed undertakers, it is not seen that serious difficulties would be encountered by permitting death certificates to be signed as above indicated. If a case of misconduct on the part of the registered assistant were to be met with, our thought is that the licensed undertaker, for whom the registered assistant was acting in the course of his employment, would be responsible for the assistant's acts.

Furthermore, Section 21 of the State Act provides that any person, who for himself or as an agent or employee of any other person, being required to fill out a certificate of death, shall fail, neglect or refuse to perform his duty as required by the act, shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned.

ICE CREAM REGULATIONS

(No. 10983—Board of Health—A. J. R.—August 1, 1947.)

The provisions of the Municipal Code regarding standards of ingredients in the manufacture of ice cream and other similar products do not apply where the products manufactured by a company located in Chicago are not sold within the City.

Citation: Municipal Code, 139, 154-14.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your letter requesting an opinion upon two questions relating to the business carried on by the Peterson Ice Cream Company.

The copy of the letter from the Company's attorney, which was enclosed with your letter to us, states in substance that the Peterson Ice Cream Company has its plant or factory at 5835 W. Lake Street, within the city of Chicago, and operates retail sales outlets or stores in Oak Park

and Riverside, in addition to one which is located at its factory site in Chicago; that by far the major portion of its sales are made outside the city of Chicago; that it is required to meet competition outside of Chicago by concerns that are not required to comply with the rules of the Board of Health of the city of Chicago; that, to overcome the disadvantage which this places upon the Company, it proposes to close its Chicago store and confine its sale operations to Oak Park and Riverside. Its product will continue to be produced at its factory or plant in Chicago. The questions submitted to us are:

“whether or not milk and milk products, or ice-cream mix, the milk and milk products ingredients which have not been produced and processed under the requirements of Section 154-14 of the Municipal Code of Chicago and the rules and regulations of the Board of Health, can be received into or used in the manufacture of ice-cream or other frozen desserts in an ice-cream factory located in the city of Chicago”;
and

“whether or not this plant is subject to the provisions of Chapter 139 of the Municipal Code of Chicago, if and when this concern discontinues the sale of ice-cream or other frozen desserts in the city of Chicago.”

Section 154-14 of the Municipal Code of Chicago provides that “No milk or milk products shall be sold in the city except Grade A pasteurized milk and milk products and Certified milk and milk products.” The section defines these products and prohibits the sale of dipped milk and milk products. The prohibition contained in this section applies to sales to the Petersen Ice Cream Company as well as sales by it. There is a difference, however, between a sale and a delivery. A sale to the Petersen Ice Cream Company of the prohibited ingredients, if the sale is made outside the city of Chicago and only the delivery takes place within the city, or if the sale and the delivery take place outside the city, would provide no reason why such prohibited ingredients could not “be received into or used in the manufacture of ice cream or other frozen desserts” in the factory located in Chicago.

Obviously sales of its products made by the Petersen Ice Cream Company outside the city would not fall within the terms of Section 154-14.

Chapter 139 of the Municipal Code of Chicago relates to ice cream factories and defines such a factory to mean “any building, room, enclosure, premises, place, or establishment in the city used for the purpose of manufacturing, making, or mixing ice cream, water ices, frozen puddings or any other food product made in part from milk and cream, and frozen, for sale within the city.” The applicability of the provisions of Chapter 139 is limited by this definition and they will not apply to the operations of the Petersen Ice Cream Company “if and when this concern discontinues the sale of ice cream or other frozen desserts in the city of Chicago.”

WITNESSING DOG EXPERIMENTS

(No. 11025—President, Board of Health—A. J. R.—February 3, 1948.)

Under the Ordinance establishing the Dog Advisory Committee no power or authority is given the members of the Committee to witness medical experiments on dogs.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your request for an opinion on the following question:

"Does every member of the Dog Advisory Committee of the City of Chicago have the right to be present, and observe experiments on any dog received from the Municipal Animal Shelter of Chicago, by institutions of learning, which contribute to public health medical training and knowledge, and the care of the sick and injured, as provided in section 98-34 of the Municipal Code?"

The Advisory Committee is appointed by the President of the Board of Health subject to the approval of the Board. The ordinance provides that the President of the Board of Health shall be chairman of the committee, and that its other members shall be the deans or chief executive officers of schools of medicine and surgery in the city of Chicago licensed by the state of Illinois to give the degree of Doctor of Medicine or Doctor of Osteopathy and whose degrees are accredited by the Department of Registration and Education of the State of Illinois, the Director of the Cook County Hospital, one person residing or doing business in the city of Chicago who is regularly licensed to practice veterinary medicine and surgery, and two citizens of the city who are not affiliated with or members of any group or profession whose members are licensed by the state of Illinois to practice the arts of healing in treating the diseases of human beings and animals.

The ordinance specifies five functions of the Advisory Committee. They are:

1. Each member of the committee receives a copy of every application made by a qualified institution for the surrender to it of animals in the custody of the poundmaster. To qualify for the making of such application an institution must be a reputable institution of learning, or a hospital or allied institution in the city, and the purpose of the application must be the use of unclaimed impounded animals in a humane manner for the good of mankind in the increase of knowledge relating to the cause, prevention, control and cure of disease;
2. Subject to the provisions of the ordinance and the approval of the Board of Health, the Advisory Committee delivers the animals only to institutions of learning which contribute to public health, medical training and knowledge, and the care of the sick and injured, and have adequate facilities for the use, care and humane treatment of animals, according to the laws of the state of Illinois;
3. The Advisory Committee inspects annually, or oftener, all institutions obtaining animals under the ordinance, and the committee is obliged to promulgate the regulations which the ordinance sets forth;
4. The Advisory Committee receives all complaints regarding the allocation, care and use of animals under the ordinance, and these complaints are required to be heard by the President of the Board of Health and the Advisory Committee within five days. On proof of violation, the President of the Board of Health must refuse to allocate animals to the offending institution and report his findings to the Board of Health;
5. The Advisory Committee keeps records which are required to be preserved in the office of the president of the Board of Health.

It is obvious that none of these functions implies the right of any or every member or the Advisory Committee as a whole to observe experiments on any dog in an institution to which it has been delivered under the ordinance, unless that right can be claimed under the power to make inspections.

The making of annual or more frequent inspections of institutions receiving animals under the ordinance is a function of the committee as a whole. Its delegation to any one member of the committee, or any number of members less than all, is not provided for.

Other provisions of the ordinance indicate the purpose of these inspections. One of the qualifications which any institution must possess in order to obtain permission to use an unclaimed impounded animal is that it shall "have adequate facilities for the use, care and humane treatment of animals, according to the humane laws of the state of Illinois." The activities in which an institution is engaged would have to be ascertained in order to determine its right to make an application. Under sub-paragraph (a) of paragraph (C) of section 98-34, it would probably be necessary to check the number of animals received by an institution with records indicating the required sanction of the director or head of the institution.

These purposes of the inspections are manifestly important and they are such as the Advisory Committee as a whole may advantageously make.

The presence of the entire Advisory Committee, or even of part of its membership, in an operating room or laboratory during the delicate task of performing a surgical operation involves their entrance into a private place which could not be regarded as warranted unless it could be held that in some manner their presence was authorized by law or was invited or permitted by the owner of the premises.

No such authorization is expressed in the ordinance, nor does the ordinance expressly compel any such invitation or permission nor, in our opinion, can it be regarded as implied in the functions which the Advisory Committee is authorized to perform. It is therefore our opinion that the right to witness the experiments does not exist under the ordinance.

It is our further opinion, that if the right could be implied in favor of any member of the Advisory Committee there is no basis upon which the implication could be extended far enough to permit the presence of a lay-member of the committee not competent to pass judgment upon what was observed.

INFANT CARE

(No. 11042—Board of Health—A. J. R.—March 10, 1948.)

The Board of Health does not have the authority to require that each "home" licensed by the State Department of Public Health, and caring for infants under one year of age carry out the necessary and proper techniques as established by the Board in the care and feeding of infants to prevent the spread of any contagious or epidemic disease. The Board of Health cannot limit a "home" to not more than two infants under one year of age, at any one time.

Citations:

188 Ill. 444.

331 Ill. 129.

Statute: IRS '47, Ch. 23, Secs. 299 to 299-M.

IRS '47, Ch. 111 $\frac{1}{2}$, Pars. 35.16 to 35.30.

Ordinances: Municipal Code, 9-19, 136.1.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your letter of February 5, 1948, requesting an opinion upon the following questions:

"Does the Board of Health have the authority under this section to require that:

1. Each home, licensed by the State Department of Public Health, pursuant to an Act of Legislature, Chapter 23, Section 299-A, Illinois Revised Statutes, 1947, and caring for infants under one year of age, carry out the necessary and proper techniques as established by the Board of Health in the care and feeding of infants to prevent the spread of any contagious or epidemic disease?

2. Each home be limited to the care of not more than two infants, under one year of age, at any one time?

If your answer is 'No,' is there any other section of the Municipal Code that gives the Health Department such authority?"

The section referred to in your first question is Section 9-19 of the Municipal Code of Chicago which provides in part:

"The board of health may direct any nuisance to be abated . . . and take any other measures it may deem necessary and proper to prevent the spread of any contagious or epidemic disease."

Two chapters of the Municipal Code of Chicago relate to institutions more or less resembling those licensed by the state under the statute to which you refer. The institutions of which regulation is provided for by Chapter 136 are defined in Section 136-1 which is as follows:

"136-1. The word 'home' is hereby defined to mean any institution, place, or family used for the reception or care of three or more infants or children apart from their parents. A 'home' is further defined to mean any institution used for the reception or care of persons who are dependent or not capable of properly caring for themselves, and shall be understood to include homes for the aged or infirm, orphan asylums, half-orphan asylums, refugees, and shelters."

Chapter 136 exempts institutions licensed by the state and need not be further considered.

The institutions known as nursing homes and of which regulation is provided for by Chapter 136.1 of the Code are defined in Section 136.1-1 which is as follows:

"136.1-1. For the purpose of this chapter, the term 'nursing home' means any place, including a mutual care home, for the reception or care of three or more persons of the age of sixteen years or over who are not related to the keeper and are dependent or not capable of properly caring for themselves. The term 'mutual care home' is defined as meaning any place for the reception or care of three or more persons, under sixteen years of age, who are not related to the keeper and whose parents or guardian are also resident in the same place and share daily care of such persons with the keeper."

Chapter 136.1 contains provisions for the licensing and inspection of the institutions to which it relates, regulations to which those institutions are required to conform and provides penalties for violations.

Chapter 136.1 is by its terms to be in force and effect only for the duration of the war and six months thereafter.

The institutions placed under state regulation by "An Act to provide for the licensing and supervision of child welfare agencies and family homes, to regulate the visitation, placement, importation, and transfer of children, and to repeal certain Acts therein named" approved July 10, 1933, are defined in Section I of that Act which is paragraph 229a of Chapter 23 of the Revised Statutes of the State of Illinois (1947). That section is as follows:

"299a. TERMS DEFINED.) §1. For the purposes of this Act: 'Child welfare agency' means any person or any institution, whether public or private, incorporated or unincorporated, receiving with or without transfer of custody, one or more neglected, delinquent or dependent children not related by blood or marriage, unattended by parent or guardian for the purpose of providing such children with care and maintenance, part time or all the time, or of placing them in foster homes, whether for gain or otherwise. This term shall include day nurseries, training schools for boys and industrial schools for girls, but shall not apply to any boarding school in which graded educational instruction is given.

'Family home' means the place of residence of any person who receives therein for gain or otherwise one or more children, sixteen years of age or under, for control, care and maintenance, with or without transfer of custody, who are not related to such person and whose parents or guardian are not resident in the same house except not more than two children upon commitment by a court of competent jurisdiction. 'Department' means the Department of Public Welfare."

It is to be noted that the licensing department is the State Department of Public Welfare rather than the State Department of Public Health.

The statute provides for the licensing and annual examination by the state of the institutions to which it relates, prescribes regulations to which those institutions are required to conform and provides for the revocation of licenses and penalties for violation of the Act.

We think it is pertinent that this statute does not contain any provision such as is found in the statute relating to the licensing and regulation of homes for the maintenance, care and nursing of persons who are ill or physically infirm, (Illinois Revised Statutes 1947, Chapter 111½, Paragraphs 35.16 to 35.30, both included) which provides that "any city, village or incorporated town may by ordinance, provide for the licensing and regulation of homes or nursing homes as herein defined, within such municipality," and that the provisions of that statute, with one exception therein named, "shall not apply within any municipality which enacts such an ordinance provided, that such ordinance substantially complies with the minimum requirements of this Act."

It is a settled rule of law that a city has no inherent power to regulate any business, occupation or institution. The power to do so must be plainly and unmistakably granted by the legislature or be necessary to the exercise of a power so granted. Even if the power is granted the legislature may at any time withdraw it or restrict its exercise. Such a withdrawal is the result of the enactment of legislation with which the exercise of the granted power would be in conflict. Where an Act of the legislature provides for the granting of a license by the state, and the law does not

provide for an additional licensing power in the municipality, the municipality is without power to regulate or prohibit the licensed business, occupation or institution. *Wilkie v. City of Chicago*, 188 Ill. 444 (1900); *City of Chicago v. Jensen*, 331 Ill. 129 (1928).

If the terms of Section 9-19 of the Municipal Code, to which you refer, could be held to cover the situation described in your letter, the power of the city to enforce it, has, in our opinion, been withdrawn by the state to the extent that the enforcement of that section would conflict with the provisions of the Act of July 10, 1933 relating to the licensing, examination and regulation of welfare agencies and family homes by the State (Illinois Revised Statutes, Chapter 23, Paragraphs 299a to 299m, both included).

We see no conflict between the provisions of Chapter 136.1 relating to mutual care homes as defined therein and the Act of July 10, 1933. There may be a conflict between the provisions of Chapter 136.1 relating to nursing homes and the Act of July 10, 1933, so far as dependent children over the age of sixteen years and under the age of twenty-one years are concerned. To the extent of any conflict, Chapter 136.1 must yield to the provisions of the Act of July 10, 1933.

For the reasons herein set forth our reply to your two questions must be: (1) That the Board of Health does not have authority under Section 9-19 of the Municipal Code of Chicago to make and enforce the requirements numbered 1 and 2 in your first question; and (2) That there is no other section of the Municipal Code which gives the Health Department such authority.

DANGEROUS DISEASES

(No. 11081—President, Board of Health—H. A. I.—October 29, 1948.)

A proposed resolution by the Board of Health declaring tuberculosis meningitis to be a contagious communicable disease dangerous to the public health and setting up measures for the control thereof is valid and within the powers of said Board.

Citations:

- Statute: IRS '47, Ch. 24, pars. 23, 81, 82.
IRS '47, Ch. 111½, par. 22.
- Ordinance: Municipal Code, 9-11, 9-13, 9-14.
- Cases: 252 Ill. 311.
302 Ill. 423.
385 Ill. 565.
199 Cal. 582.
14 N. E. 2d 579 (Ind.)

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your communication requesting an opinion as to whether the Board of Health of the City of Chicago has the power to adopt the following proposed resolution and whether the same is in proper legal form:

"WHEREAS, tuberculous meningitis is declared, by the Rules and Regulations for the Control of Communicable Diseases, Revised and in Force Through Illinois, September 1, 1945, issued by the Illinois Department of Public Health, to be contagious, infectious, communicable, and dangerous to the public health; and

WHEREAS, no provisions are made, under those Rules and Regulations, for the isolation and care of such patients, commensurate with the danger of the disease to public health; therefore

BE IT RESOLVED, that the following requirements be enacted by the Board of Health in the interest of the health and safety of the people of the City of Chicago:

**Control of Case:*

1. Placarding of premises is required.
2. Isolation is required.
3. Concurrent disinfection is required.
4. Terminal disinfection is required.

*The definition of the terms used in this resolution shall be in accordance with the description contained in Chapter IV of the Rules and Regulations for the Control of Communicable Diseases, Revised and in Force Through Illinois, September 1, 1945, issued by the Illinois Department of Public Health."

The first question presented is whether the Board of Health of the City of Chicago has the power to adopt quarantine measures. Under the Cities and Villages Act the City Council is given power "to provide for and maintain a Board of Health, * * * and prescribe its powers and duties * * * "to do all acts, make all regulations which may be necessary or expedient for the promulgation of health or the suppression of disease." Illinois Revised Statutes, 1947—Chap. 24, Pars. 23-81-82.

In pursuance of the foregoing authority the City Council has enacted the following ordinances:

Section 9-11 of the Municipal Code of Chicago providing as follows:

"The Board of Health shall perform the following duties:

(a) Enforce all the laws of the state and provisions of this code in relation to matters pertaining to the public health and the sanitary conditions of the city.

(b) Promulgate and enforce all rules and regulations of the Board of Health or any other state or local authority with power to make rules and regulations concerning the public health."

(d) "Determine when a disease is contagious or epidemic and establish quarantine regulations whenever it is deemed necessary." Section 9-13 of the Municipal Code of Chicago providing as follows:

"The board of health shall have power to make such rules and regulations, as it may deem necessary or advisable, in relation to the sanitary condition of the city and for the prevention and suppression of disease, not inconsistent with the provisions of this code. Such rules or regulations shall take effect and be in force ten days after publication in a daily newspaper of the city, except in cases of emergency as hereinafter provided."

Section 9-14 of the Municipal Code of Chicago providing as follows:

"In case of contagious or epidemic disease or of danger from anticipated or impending contagious or epidemic disease, or in case

the sanitary condition of the city shall be of such a character as to warrant it, it shall be the duty of the said board of health to make such rules and regulations and to take such measures and to do and order to be done and cause to be done such acts for the preservation of the public health (though not herein or elsewhere or otherwise authorized) as it may in good faith believe and declare the public safety and health demand. All such rules and regulations so declared by the said board of health to be emergency rules and regulations shall take effect immediately even if not yet published, but as soon as may be after the promulgation of the same, the said emergency rules and regulations shall be published, with notice that they are in force in the city."

In the case of *People v. Robertson*, 302 Ill. 423, 1922, in discussing the power of the city to enforce quarantine with respect to typhoid fever or suspected carriers of typhoid fever, the Court stated "health authorities cannot promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infectious diseases which are not founded upon an existing condition or well founded belief that a condition is threatened which will endanger the public health."

The court went on to say, pages 433 and 434:

"It is not necessary that one be actually sick, as that term is usually applied, in order that the health authorities have the right to restrain his liberties by quarantine regulations. Quarantine is not a cure—it is a preventive. As the term is used in this opinion, quarantine is the method used to confine the disease within the person in whom it is detected or to prevent a healthy person from contracting the infection. Disease germs do not usually travel through the air unaided, but they are carried by insects, by dumb animals and by human beings. Effective quarantine must therefore be not so much the isolation of the person who is sick or affected with the disease as a prevention of the communication of the disease germs from the sick to the well. * * * Quarantine, in the very nature of the regulation, is not a definite or uniform measure but it must vary according to the subject. One of the important elements in the administration of health and quarantine regulations is a full measure of common sense. It is not necessary for the health authorities to wait until the person affected with a contagious disease has actually caused others to become sick by contact with him before he is placed under quarantine."

If, therefore, in the judgment of the Board of Health of the City of Chicago based upon sound medical and scientific research, and well founded upon existing conditions, tuberculous meningitis will endanger the public health if left uncontrolled as appears from your letter, then the Board of Health of the City of Chicago may establish by resolution necessary quarantine measures provided they do not conflict with any existing state laws or regulations on the subject.

This then brings us to the next question—Is the proposed resolution of the Board of Health of the City of Chicago with respect to tuberculous meningitis in conflict with the state laws or regulations of the State Department of Public Health?

Paragraph 22 of Chapter 111½ of the Illinois Revised Statutes in force in 1947 provides in part as follows:

"The State Department of Public Health has general supervision of the interests of the health and lives of the people of the state. It has supreme authority in matters of quarantine and may declare and enforce quarantine where none exists, and may modify or relax quar-

antine when it has been established. The Department may make such rules or regulations, such sanitary investigation as it may from time to time deem necessary for the preservation and improvement of the public health. * * * The Department of Public Health shall investigate the causes of dangerously contagious or infectious diseases, especially when existing in epidemic form and to take means to restrict and suppress the same, and whenever such disease becomes or threatens to become epidemic in any village or city, and the local Board of Health or local authorities neglect or refuse to enforce efficient measures for its restrictions or suppression, or to act with sufficient promptness or efficiency, or whenever the local Board of Health or local authorities neglect or refuse to promptly enforce efficient measures for the restrictions or suppression of dangerously contagious or infectious diseases, the Department of Health may enforce such measures as it deems necessary to protect the public health, and all necessary expenses so incurred shall be paid by the City or Village for which services are so rendered."

Chapter 1 of the Rules and Regulations for the control of communicable diseases issued by the State Department of Public Health in force and effect September 1, 1945, provides as follows:

"Reportable Diseases

For the purpose of these rules and regulations the following named diseases and disease carriers are declared to be contagious, infectious, communicable and dangerous to the public health and shall be reportable in accordance with the provisions of these regulations.

* * * * *

Item 33. Meningitis, other."

Chapter V entitled—"Detailed Procedure for the Control of Communicable Diseases"—

"Meningitis, other

(Influenzal, Pneumoccal, Streptococcal, Syphilitic, Tuberculosis and Unspecified)

Control of case:

- (1) Placarding of premises is *not* required.
- (2) Isolation is *not* required.
- (3) Concurrent disinfection is *not* required.
- (4) Terminal disinfection is *not* required.

Control of Contacts:

- (1) No restrictions are required."

It will be readily observed that aside from the reporting of tuberculous meningitis to the State Department of Public Health, no other requirements are set forth in this regulation with respect to the control of this disease.

In the case of *City of Chicago v. Union Ice Cream Co.*, 252 Ill. 311 (1911), the court said:

"Municipal corporations are bodies politic, vested with many political and legislative powers for local government and police regulations, established to aid the government by the State. The necessity for their organization may be found in the density of the popula-

tion and the conditions incidental thereto. Because of this, the municipal government should have power to make further and more definite regulations than are usually provided by general legislation and to enforce them by appropriate penalties. * * * Municipal authorities cannot under a general grant of power, such as Article 5 of the Cities and Villages Act, adopt ordinances which infringe the spirit of the state law or are repugnant to the policy of the state as declared by general legislation, but the police regulations of a municipality may differ from those of the State upon the same subject, if they are not inconsistent therewith."

And in *Dean Milk Co. v. City of Chicago*, 385 Ill. 565, (1944) an analogous problem was presented to the court. An ordinance of the City of Chicago requiring that milk sold in quantities less than one gallon be delivered in standard milk bottles, was attacked on the grounds that it was in direct conflict with and contravened the policy of the State Law which permitted the use of paper single service containers. While recognizing that power and authority for the regulation of the sale of milk had been clearly given to the City Council by the Cities and Villages Act, the plaintiffs urged however that the state had preempted the entire field and, therefore, the city was powerless to act. The court overruled this contention and upheld the validity of the ordinance in question stating that

"maintenance of a pure and wholesale milk supply is one of the principal concerns of the Municipal Government. The regulation of the sale and distribution of milk is vital to the preservation of the public health. The City of Chicago had the power and authority to enact an ordinance regulating and prescribing the containers in which milk in quantities of less than one gallon should be delivered within the city."

And in *Spitler v. Munster* (Ind.), 14 N. E. 2nd 579, 115 A. L. R. 1395 (1938) a very similar situation presented itself. An ordinance defining and regulating tourist camps was upheld as a proper exercise of the police power, the court holding that the statute providing that the state board of health should have "general supervision" of the health and sanitary condition of all tourist camps, and the power to make and promulgate rules and regulations in connection therewith, did not expressly reserve to the state the exclusive control over the regulation of such camps; that the municipality had the power to make regulations for the prevention of fire hazard and in connection with sanitary measures appropriate to the use of property in an urban center which might not be necessary in rural communities; that the fact that the ordinance in question defined a tourist camp in a manner different from that adopted by the statute, and provided for more cubic feet of space per person in sleeping rooms than was required by the state regulation, did not cause it to be unreasonable or repugnant to or in conflict with the state regulation.

Cited therein is the well known decision in *re Iverson*, 199 California 582, a leading case in other jurisdictions and, is singularly analogous to our situation. There a Municipal ordinance made it unlawful to sell any alcoholic liquor within the City of Los Angeles in quantities not to exceed eight ounces of alcoholic liquor where the State law permitted the sale of intoxicating liquors in quantities not exceeding 16 ounces. The question presented was the City ordinance in conflict with the State law.

The court said:

"The only way a legislature can inhibit local legislative bodies from enacting rules and police regulations is by the state itself occupying the same legislative field so completely that legislation on the subject by local legislative bodies will necessarily be inconsistent with

the state act. It does not follow that because the legislature has been fit to make certain general rules applicable in all the cities and elsewhere in the state it has thereby impliedly prohibited the enactment of additional local regulations by municipalities in keeping with the purpose of the general law. So long as the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both may stand. There may be different regulations without a conflict. * * * Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. * * * Whether the legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate."

A careful analysis of paragraph 22 of Chapter 111½ of the Illinois Revised Statutes of 1947 reveals the general policy of the law which is set out in the following language:

"* * * The Department may make such rules and regulations and such sanitary investigations as it may from time to time deem necessary for the *preservation and improvement of the public health* * * *"
(Italics ours.)

Paragraph 22 further provides that when the local Board of Health authorities *neglect or refuse to enforce efficient measures for the restriction or suppression* or act with sufficient promptness or efficiency, or whenever the local Boards of Health *neglect or refuse to promptly enforce efficient measures for the restriction or suppression of dangerously contagious or infectious diseases*, the Department of Health may enforce such measures as it deems necessary to protect the public health. It will be readily observed that the State not only did not intend to exclusively occupy this field but imposed a primary duty upon the local Board of Health to act whenever it was necessary to protect the public health. The ultimate purpose and the general policy of this paragraph is to provide for the preservation and improvement of the public health and the suppression of dangerously infectious disease, and of necessity all regulations of the Department of Public Health must be made in furtherance of this general policy and in conformity therewith. The particular State regulation with respect to tuberculous meningitis is a mere declaration that this disease is contagious, infectious and dangerous to the public health but provides no means whatsoever for its control. The proposed resolution is intended to provide those measures which in the judgment of the Board of Health of the City of Chicago are necessary to properly protect the public against the effects of tuberculous meningitis declared by the State to be dangerous. Applying the tests set forth in the cited authorities, the proposed resolution of the Board of Health of the City of Chicago is a reasonable exercise of its powers and is not repugnant to nor inconsistent with the policy of the state statute and the regulations of the State Department of Public Health adopted pursuant thereto. Such proposed resolution merely gives force to what would otherwise be a mere ineffectual declaration.

It is, therefore, our opinion that the Board of Health of the City of Chicago has the power to adopt the resolution hereinabove set forth. It is our further opinion that the said resolution is in proper legal form being couched in substantially the same language employed in those regulations adopted by the State Department of Health.

D. OTHER DEPARTMENTS AND OFFICES

CITY'S POWERS IN COAL SHORTAGE

(No. 10741—Commissioner of Public Works—M. H. F.—March 26, 1943.)

In the absence of legislation the City would not have the power to seize coal from private consumers during emergency shortages.

Citations:

Statutes:	IRS '41, ch. 24, par. 166.	
	Ch. 47 (Eminent Domain Act).	
Cases:	99 U. S. 635.	268 Ill. 256.
	223 U. S. 390.	270 Ill. 399.
	113 Fed. 2d 387.	278 Ill. 591.
	23 Ill. 202.	279 Ill. 319.
	87 Ill. 317.	300 Ill. 577.
	112 Ill. 589.	335 Ill. 101.
	196 Ill. 54.	357 Ill. 150.
	239 Ill. 197.	359 Ill. 337.
	248 Ill. 299.	372 Ill. 33.
	251 Ill. 58.	374 Ill. 384.
	251 Ill. 265.	77 Ill. App. 124, 134.
	Other references:	29 C. J. S. sec. 65.

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date calls attention to the status of the city's coal supply, which you say is so low as to constitute a possible emergency. You outline the dire consequences which might result in the event further supply were interrupted and the city forced to shut down one or more of its water pumping stations, thereby seriously crippling the great war industries located within and contiguous to the city which are dependent upon securing an adequate supply of water from the city. You also mention the effect upon the city's normal activities in furnishing water to domestic and commercial users, as well as its fire fighting ability. Anticipating this possible emergency and to aid you in the preparation of plans to meet it, you ask our advice upon the question whether in such a necessitous situation the city would have the authority to commandeer coal from private consumers in order to maintain its essential activities.

Municipalities are creatures of the legislature, possessing no inherent powers, but only such powers as the legislature has expressly conferred upon them, or such as are necessarily incident to powers expressly granted. *Chicago Cosmetic Co., v. City of Chicago*, (1940) 374 Ill. 384; *City of Chicago v. Chicago Beverage Co.*, (1939) 372 Ill. 33.

Doubtful powers are resolved against municipal corporations. *People v. Village of Oak Park*, (1915) 268 Ill. 256.

While the state is sovereign, possessing all power not surrendered to the federal government or denied by the constitution, and while the federal government under the broad grant of authority given and exercised by it under its war powers, would doubtless have authority to condemn or expropriate private property for public use, for the purpose of answering your inquiry we need discuss only the question of the city's power.

We find no express grant of power given the city in and by the Cities and Villages Act to seize personal property such as coal under necessitous circumstances.

In the absence of a specific grant of power we are led to a consideration of the question whether the city has the right to take the coal under the conditions stated under the power of eminent domain. If the exercise of the power of eminent domain would not produce results we would be at a loss to know how the desired results might be accomplished without federal aid.

Eminent domain is the right or power to take private property for public use. More precisely, it is the right of the nation or state, or those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property for such use upon paying the owner due compensation to be ascertained according to law. *Western Union Tel. Co. v. Louisville N. R. Co.*, (1915) 270 Ill. 399. It is an inherent and necessary attribute of sovereignty, existing independently of constitutional provisions and superior to all property rights. The exercise of the right is in effect a compulsory sale of the owner's interest in the property, his rights yielding to considerations of common welfare. The power of eminent domain is distinguished from other governmental powers affecting private property, such as the police power, power to tax, and the regulation of interstate commerce. Eminent domain takes property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to the public interest. *East Side Levee Dist. v. M. & O. R. Co.*, (1917) 279 Ill. 319; *City of Chicago v. O'Connell*, (1917) 278 Ill. 591.

The illustration given by you in your communication of the destruction of buildings in order to check the spread of a conflagration is not regarded as pertinent as the exercise of such authority would be by virtue of the city's police power and not pursuant to a right to condemn property for public use.

In the absence of authority, the power of eminent domain cannot be exercised. It may, however, be exercised either directly by the legislature of the state, or by virtue of a delegation of the power. *Department of Public Works and Buildings v. Ryan*, (1934) 357 Ill. 150. A state has the right to say on what property or to what extent the right of eminent domain shall be exercised. The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication; and acts conferring it are to be strictly construed. *Department of Public Works and Buildings v. Schlich*, (1935) 359 Ill. 337; *Department of Public Works and Buildings v. Ryan*, (1934) 357 Ill. 150; *Town of Kingston v. Anderson*, (1921) 300 Ill. 577; *Chicago & N. W. Ry. Co. v. Chicago Mechanics' Institute*, (1909) 239 Ill. 197.

While the power is in derogation of common rights and acts conferring it are generally construed strictly in favor of the property owner, this principle is not applied as strictly to public bodies as it is in construing powers given to private corporations and the construction should not be so strict as to defeat the evident purpose of the legislation. *United States v. Meyer*, (1940) 113 F. 2d 387.

The right of eminent domain may, to the extent and for the purposes designated by the state, be exercised by public corporations, including municipalities. *Northern Transportation Co. v. City of Chicago*, (1878) 99 U. S. 635.

Generally speaking, the power of the state to take property, or to authorize the taking thereof, by the exercise of the right of eminent domain extends to every species of property within its territorial jurisdiction,

including real estate, all kinds of personal property, and even to intangible or incorporeal rights. *United States v. Cincinnati etc. R. Co.*, (1912) 223 U. S. 390; 29 C.J.S., Section 65.

Unless exempted from appropriation the property of a private corporation is equally liable with the property of an individual to be taken for a public use. *Bach Brick Co. v. City of Chicago*, (1929) 335 Ill. 101.

While the general rule permits condemnation of property already devoted to a public use, the rule is subject to the limitation that such property cannot ordinarily be taken to be used for the same purpose in the same manner, as this would amount simply to the taking of property from one and giving it to another without any benefit or advantage whatever to the public. *Chicago & North Western R. Co. v. Chicago & E. R. Co.*, (1884) 112 Ill. 589.

While property of every kind is in general subject to the power of eminent domain, only such property may be taken in a particular case as is expressly authorized by the statute conferring the power, or is necessarily implied from the terms thereof. This projects the question concerning the extent of the power granted by the legislature to municipalities in Illinois.

The Illinois Eminent Domain Act, Chapter 47, Illinois Revised Statutes, 1941, while not specifically mentioning personal property, has been held to extend to every kind of property.

In *South Park Commissioners v. Ward & Co.*, (1911) 248 Ill. 299, at page 304 the court said:

"The right of eminent domain is an inherent attribute of sovereignty, existing independently of written constitutions or statutory laws, although it is regulated by appropriate legislation. It is the power of the sovereign to appropriate private property to the public use, limited only by the constitutional provision for compensation. It extends to every kind of property, including not only that which is tangible, but all rights and interests of any kind, including easements. (*Johnson v. Joliet and Chicago Railroad Co.*, 23 Ill. 202; *Metropolitan City Railway Co. v. Chicago West Division Railway Co.*, 87 id. 317; *Sholl v. German Coal Co.*, 118 id. 427.)"

In *C. & N. W. Ry. Co., v. Miller*, (1911) 251 Ill. 58 the court held that owners of leasehold interests have a right to a jury trial upon the question of damages to which they are entitled as the result of the taking of the property by condemnation proceedings.

In *City of Edwardsville v. County of Madison*, (1911) 251 Ill. 265 the court said (p. 266):

"The right of eminent domain is the power of the State to appropriate private property to the public use, and it extends to every kind of property and to every public use."

The Eminent Domain Act provides that private property shall not be taken or damaged for public use without just compensation, and that in all cases in which compensation is not made by the state in its corporate capacity, such compensation shall be ascertained by a jury, as prescribed in the act. It outlines the procedure and covers the matters of parties, service of summons, hearing, jury trial, etc.

By section 7, part three of the act of April 10, 1872, added by act approved May 18, 1905, paragraphs 166 *et seq.*, chapter 24 Illinois Revised Statutes, 1941, the City of Chicago was granted the following powers:

"The City may exercise the right of eminent domain by condemnation proceedings in conformity with the provisions of the constitution and statutes of the State of Illinois for the acquirement of property useful, advantageous or desirable for municipal purposes, and the procedure in such cases shall be, as nearly as may be, like that provided for in an act entitled, 'An act concerning local improvements,' approved June 14, 1877, in force July 1, 1897, as now or hereafter from time to time amended."

The word "property" is used, hence it may be fair to assume that by this section the city has been delegated express power to condemn every kind of property.

It therefore seems probable that under this grant of power the city may exercise the right of eminent domain and by condemnation proceedings acquire coal for public use. The exercise of the power, however, is restricted by the provisions of section 7, above quoted, which prescribe procedure in conformity with the Eminent Domain Act and also, as nearly as may be, like that provided for in the local improvements Act. The delays incident to compliance with the Eminent Domain Act, including the preparation and filing of the petition, securing service upon defendants, the court hearing, impanelling of and determination of award by a jury, entry of judgment, payment by the city of the compensation ordered, and review of the case by appeal to the Supreme Court, it is feared would render the proceeding too slow and cumbersome to satisfy the needs of the city in an emergency. In the event an appeal were taken the time consumed thereby could be avoided only by the city posting a bond. The act provides that the petitioner shall, notwithstanding an appeal, have the right to enter upon the use of the property upon filing a surety bond conditioned for the payment of such compensation as may be finally adjudged. The requirement of section 7 that the procedure in the city's condemnation actions shall be, as nearly as may be, like that provided for in the Local Improvements Act, appears to be both unfortunate and calculated further to impede summary action.

At the time of the so-called Pullman strikes in 1897 the militia was called out to aid in suppressing riots. The Mayor ordered the police department to take possession of the Chicago League Ball Park which was then used as a place to quarter the troops. Later the city was sued by the owner of the ball park for rent of the property and damages alleged to have been sustained by reason of injuries done to the property. In discussing the duty of the mayor to see that laws and ordinances are enforced within the city and the question of the mayor's extraordinary powers in emergencies the Appellate Court of the First District in the case of the *Chicago League Ball Club v. City of Chicago*, (1897), 77 Ill. App. 124, 134 said:

"He is not, however, specially authorized to incur liability for the city, even in an emergency, except where provision has been expressly made, and authority conferred according to law. He is nowhere authorized to take or damage private property for public use."

The court's opinion, however, goes on to state that an emergency, when shown to exist in time of war or of immediate and impending public danger, justifies the taking of private property for public use. On page 140 the court said:

"It is, as we have said, only the emergency, too urgent to admit of delay that can justify the taking of private property for the benefit of the city in extreme cases without previous provision for compensation, and thus create obligation on the part of the city to reimburse the owner. 'If the public necessity in fact exists, the act is lawful.'"

The case is not satisfactory as a precedent though the Appellate Court's decision does recognize to some extent the peremptory taking of private property for public use by municipal corporations in cases of extreme necessity, in time of immediate and impending public danger. In *City of Chicago v. Chicago League Ball Club* (1909), 196 Ill. 54, the judgment of the Appellate Court was reversed, the Supreme Court holding that the city was not liable for damages to the property taken as the city was but the representative of the state and that when the militia was called out it was called out by the governor, and that when the state sends troops to a city to aid in suppressing a riot, the city is not liable for the rent of the property taken as a camp ground, nor for the damage done thereto. The Supreme Court's decision did not disturb the municipal action in peremptorily appropriating the privately owned ball park. Furthermore the authorities cited in the Appellate Court's opinion appear to justify the taking of private property for public use in cases of extreme necessity, for then under such imperious circumstances, private rights must give way for the time to the public good. The rights of private property, inviolable as the law regards them, are yet subordinate to the higher demands of the public welfare. In extremes resort may be had to the principle *salus populi suprema est lex*.

The state legislature being now in session it would be possible for it by the enactment of emergency legislation to grant cities express powers for the duration of the war. The advisability of promoting legislation to aid in the solution of your problem may therefore be worthy of consideration.

Our conclusion is that unless the legislature at its present session invests cities in Illinois with further and special powers, the condemnation authority possessed by the city will be found too slow and cumbersome for your stated emergency needs, and that the drastic or summary seizure authority is too nebulous for us to base upon it formal advice.

At this juncture it is believed you should seek out every possible arrangement whereby the city may be given priorities by some competent federal agency exercising the broad war powers of the federal government.

SUPPLYING WATER OUTSIDE CITY

(No. 10749—Commissioner of Public Works—M. H. F.—June 28, 1943.)

See opinion No. 10847, June 8, 1945, pages 125-126.

ANNEXATION OF A CEMETERY

(No. 10759—Commissioner, Public Works—E. J. K.—December 10, 1943.)

Before a cemetery or any other property can be annexed by the City it must first be disconnected from any other city or village.

Citations:

Statutes: IRS '43, ch. 24, sec. 7-1, 7-2, 7-8, 7-40, 7-42.

Cases: Circuit Ct. No. 39-C-4779.

OPINION OF FOREGOING SYNOPSIS

We have your letter of November 8, 1943, requesting our opinion as to the legality of the ordinance passed by the City Council on September 29, 1943, providing for the annexation of Cedar Park Cemetery and including that part of the North half of W. 127th Street and the West half of S. Halsted Street adjoining the cemetery property.

We have examined the ordinance which appears on Pages 626-27 of the Journal of the Proceedings of the City Council for the Regular Meeting of September 29, 1943. We have also examined papers submitted to us which include petition to disconnect certain lands from the Village of Calumet Park stipulation of Facts and Decree in the case of *Cedar Park Cemetery Association, Inc. v. Village of Calumet Park*, Circuit Court Case No. 39-C-4779, Decree in County Court Case No. 100986 in regard to Petition of Cedar Park Cemetery Association, Inc., for annexation of certain lands to the City of Chicago, typewritten memorandum quoting sections of the Illinois Revised Statutes in regard to disconnecting of lands from cities, towns and villages; and copy of plat which was attached to said annexation ordinance.

The said plat discloses that the cemetery is bounded on the south by 127th Street which is at the city limits of Chicago so that the North half of 127th Street at this location is in the Village of Calumet Park and the South Half of 127th Street is in the City of Chicago. The east side of the cemetery borders on S. Halsted Street which is also the city limits of this location so that the West half of South Halsted Street adjoining the cemetery is in the Village of Calumet Park and the East half of the street is in the City of Chicago.

The decree in the proceedings to disconnect the cemetery from the Village of Calumet Park does not include those parts of 127th Street and S. Halsted Street above mentioned as being located in said village, while the decree in the proceedings to annex the cemetery of the City of Chicago and the said ordinance providing for the annexation of the cemetery to the City of Chicago both include those parts of said streets.

The question has been raised as to whether under the circumstances the said parts of 127th Street and S. Halsted Street will when the ordinance becomes effective be legally annexed to the City of Chicago in addition to the cemetery. The further question has been raised as to whether the cemetery property is contiguous to the City of Chicago since half aforementioned streets are in Chicago and half in the Village of Calumet Park. Alderman Lindell says in his letter that the question raised by the streets is answered in Paragraph 7-8 Chapter 24 of the Illinois Revised Statutes. He further states that the disconnection was in accordance with Section 7-42, Chapter 24 of the Cities and Villages Act.

Section 7-42, Chapter 24 of the Cities and Villages Act, Ill. Rev. Stats. 1943 is as follows:

"7-42. Land disconnected by court procedure.) The owner or owners of record of any area of land consisting of one or more tracts, lying within the corporate limits of any municipality, which (1) is not contiguous in whole or in part to any other municipality; (2) contains twenty or more acres; (3) is not subdivided into municipal lots and blocks; (4) is located on the border of the municipality; and (5) which, if disconnected, will not result in the isolation of any part of

the municipality from the remainder of the municipality, may have the area disconnected as follows:

The owner or owners of record of any such area of land shall file a petition in the county or circuit court of the county where the land is situated, alleging facts in support of the disconnection. The municipality from which disconnection is sought shall be made a defendant, and it, or any taxpayer residing in that municipality, may appear and defend against the petition. If the court finds that the allegations of the petition are true and that the area of land is entitled to disconnection it shall order the specified land disconnected from the designated municipality."

We are of the opinion that this section provides a means of disconnecting property from the municipality in which it is located where the property adjoining and surrounding the property sought to be disconnected is not a part of any other municipality. Requisite number 1, as quoted above, provides that the property to be disconnected must not be contiguous in whole or in part to any other municipality and the law was the same in this respect at the time of proceedings in question. Any property disconnected from one municipality for the purpose of being annexed to another municipality would necessarily have to be contiguous to the municipality to which it was to be annexed and such property would have to be disconnected by the Corporate Authorities of the municipality in which the land was located as provided for in Section 7-40, Chapter 24 of the Cities and Villages Act, Ill. Rev. Stats. 1943, which is as follows:

"7-40. Lands disconnected by corporate authorities—Procedure.) Any territory, within any municipality, which (1) is upon the border but within the boundary of the municipality, and (2) is not laid out into municipal lots or blocks may be disconnected from the municipality, in the discretion of its corporate authorities as follows:

A written petition, signed by owners of record representing a majority of the area of land in such territory, shall be filed with the clerk of the municipality, requesting that the specified territory be disconnected from the municipality. The petition shall be filed at least thirty days before it is considered by the corporate authorities. The petition shall be accompanied with the certificate of the proper county clerk, showing that all city taxes or assessments due up to the time of presenting the petition are fully paid. The corporate authorities, in their discretion, may disconnect the territory from the municipality, by an ordinance passed by a majority of the members elected to the city council or board of trustees, as the case may be."

This section does not contain any restriction which would make it impossible to disconnect the property in question from the Village of Calumet Park and thereafter connect it to the City of Chicago. Under this section, the parts of streets adjoining the said property could also be disconnected from the said Village.

The cemetery and parts of streets in question could then be annexed to the City of Chicago in the manner provided for in Sections 7-1, 7-2, and 7-8 of Chapter 24 of the Cities and Villages Act, Illinois Revised Statutes 1943 which are as follows:

"7-1. Territory, how annexed.) Any territory which is not within the corporate limits of any municipality but which is contiguous to a municipality, may be annexed thereto as provided in the five following sections."

"7-2. Petition for annexation—Filing—Notice—Fee.) A written petition, signed by a majority of the owners of record of land in such

territory and also by a majority of the electors, if any, residing in such territory, shall be filed with the county clerk of the county in which the territory is located. The petition shall request the annexation of the territory to a specified municipality and also shall request that the judge of the county court of the specified county submit the question of the annexation to the corporate authorities of the annexing municipality. The judge of the county court shall enter an order fixing the time for the hearing upon the petition and the day for the hearing shall be not less than twenty nor more than thirty days after the filing of the petition.

The petitioners shall give notice of the annexation petition at least fifteen days prior to the date fixed for the hearing. This notice shall state that a petition for annexation has been filed and give the substance thereof, including a description of the territory to be annexed, the name of the annexing municipality, and the date fixed for the hearing. This notice shall be given by publication in the official newspaper of the annexing municipality if there is one, or if not, then in some other newspaper published in the county, if any, and also by posting in five of the most public places in the territory to be annexed. A copy of this notice shall be filed with the clerk of the annexing municipality.

The petitioners shall pay to the county clerk ten dollars as a filing and service fee, and no petition shall be filed until this fee is paid.

No petitioner shall have the right to withdraw from this petition except by consent of the majority of the other petitioners thereon, or where it is shown to the satisfaction of the court that the signature of the petitioner was obtained by fraud or misrepresentation.

"7-8. Annexation of territory used for highway—Ordinance—Map.) Any municipality by ordinance may annex any territory contiguous to it even though the annexed territory is dedicated or used for street or highway purposes if a portion of the street or highway is already within the annexing municipality and if no part of the annexed territory is within any other municipality. After the passage of the ordinance of annexation a copy of the ordinance, with an accurate map of the territory annexed, certified as correct by the clerk of the municipality, shall be filed with the recorder of deeds of the county in which the annexed territory is situated."

If Alderman Lindell is correct in his statement that the question raised by the streets is answered in Section 7-8 of Chapter 24, it would necessarily have to be assumed that the said streets were not within the Village of Calumet Park as required by said section. The streets and not the Cemetery property would then be located on the border of the City of Chicago. In order to have a valid disconnection of the Cemetery property under Section 7-42 of Chapter 24 it would be necessary that the Cemetery property and not the streets be located on the border of the City of Chicago.

Attorney Cowan contends that the Cemetery property is contiguous to the City of Chicago notwithstanding the location of the streets. In order to have a valid disconnection of the Cemetery property under said Section 7-42 of Chapter 24 it would have to be shown that the Cemetery property was not contiguous to the City of Chicago.

In consideration of the premises, we are of the opinion that the cemetery property was never legally disconnected from the Village of Calumet Park, that the above mentioned proceedings in the County Court and the ordinance passed by the City Council if aforesaid to annex said

Cemetery property and parts of streets in question to the City of Chicago were likewise illegal as their effectiveness and legality depended upon a legal disconnection of the property in the first instance. The fact that the half streets in question adjoining the cemetery were deeded in one case to the County and in the other case to the State would not be material in regard to their disconnection from the Village of Calumet Park and their annexation to the City of Chicago.

INCREASE IN SALE PRICE OF MAPS

(No. 10760—Commissioner of Public Works—M. H. F.—January 6, 1944.)

The Municipal Ordinance authorizing a 10% increase for licenses, permits, fees, and taxes has no application to the sale of maps by the City Map Department.

Citations:

Ordinances: Mun. Code, 23-11.

Council Orders: Coun. J. pps. 1017, 1018, Dec. 18, 1943.

OPINION OF FOREGOING SYNOPSIS

The department is in receipt of your letter of January 4, 1944, requesting our opinion as to whether the ordinance passed by the city council December 18, 1943 (Council Journal page 1018) providing for an increase of ten per cent in certain license, permit and inspection fees and taxes applies to the sale price of maps sold by the superintendent of maps.

By section 8-32 to 8-38, inclusive, of the Municipal Code of Chicago there is established in the department of public works the bureau of maps and plats embracing a superintendent of maps and such other employes as the city council may provide by annual appropriation ordinance. By section 8-37 the bureau of maps and plats is authorized to place on sale copies of city maps of such kind and at such prices as the city council has or shall designate by ordinance. By an ordinance passed by the city council January 12, 1938 (Council Journal page 5099) the bureau of maps was authorized and directed to place on sale for the public copies of certain city maps at prices shown in such ordinance.

The pertinent portion of the ordinance passed December 18, 1943 reads as follows:

"All license, permit and inspection fees and taxes (excepting for vehicles licensed or taxed pursuant to Section 23-53 of the Revised Cities and Villages Act) fixed by ordinances effective prior to January 1, 1943, hereby are increased ten percent of the amount so fixed; provided that no such fee or tax shall exceed the maximum rate or amount specifically authorized by statute."

As the ordinance last above mentioned specifically refers to license, permit and inspection fees and taxes and makes no reference to the sale price of city maps our opinion is that it does not affect the sale price of such maps.

INCREASE IN SALE PRICE OF PAMPHLETS

(No. 10761—*Municipal Reference Librarian—M. H. F.—January 6, 1944.*)

The Municipal Ordinance authorizing a 10% increase for licenses, permits, fees, and taxes has no application to the sale of pamphlets and literature by the Municipal Reference Library.

Citations:

Ordinances: Mun. Code, 23-11.

Council orders: Coun. J. pps. 1017, 1018, Dec. 18, 1943.

Your letter of January 4, 1944 states that the City Comptroller has called your attention to an ordinance passed by the City Council December 18, 1943 (Council Journal pages 1017-1018) providing for an increase of ten per cent in certain license, permit and inspection fees and taxes, and you request our opinion as to whether such increase applies to the sale of the Municipal Code, ordinances and other publications by the Municipal Reference Library.

The material portion of the ordinance of December 18, 1943 reads as follows:

"All license, permit and inspection fees and taxes (excepting for vehicles licensed or taxed pursuant to Section 23-53 of the Revised Cities and Villages Act (fixed by ordinances effective prior to January 1, 1943, hereby are increased ten per cent of the amount so fixed; provided that no such fee or tax shall exceed the maximum rate or amount specifically authorized by statute."

By section 23-11 of the Municipal Code of Chicago the Municipal Reference Librarian is authorized to distribute and sell certain publications of the city. Those publications mentioned in the fourth paragraph of your letter we assume to be among the documents which you are authorized to sell by the above mentioned section. By orders passed by the City Council you have also been authorized to sell at prices stated in the orders copies of the Municipal Code of Chicago, amendment inserts to said code and printed volumes of the opinions of the Corporation Counsel.

We know of no license, permit or inspection fee or tax which is collectible by the Municipal Reference Library or the Municipal Reference Librarian, and inasmuch as the ordinance of December 18, 1943 refers only to license, permit and inspection fees and taxes our opinion is that this ordinance has no application to the sale by you of municipal documents and in no way affects the sale price thereof.

SALE OF PAMPHLETS BY PUBLIC LIBRARY

(No. 10764—*Board of Directors, Chicago Public Library—J. F. G.—January 16, 1944.*)

It is not an abuse of the powers of the Board of Directors of the Chicago Public Library to hold for sale at cost, extra copies of publi-

cations kept in the reading rooms for free use, if they are not readily available for purchase in book stores or at news stands.

Citations:

102 Ill. 379, 398.

102 Ill. 669.

269 Ill. App. 60.

186 Ia. 75.

104 Me. 520.

46 R. I. 283.

Statute: IRS '43, Ch. 61, Secs. 5, 6.

OPINION OF FOREGOING SYNOPSIS

Reference is made to the letter of C. B. Roden, Librarian, dated January 7, 1944, requesting an opinion as to the legality of certain activities of The Chicago Public Library therein described.

It appears that an attorney representing a taxpayer has challenged the right of the public library to charge and collect the cost of current pamphlets issued by governmental and private agencies kept for distribution upon request.

A typical list of the publishers of the pamphlets has been furnished to us. Among them are the following: Office of War Information, Office of Price Administration, Department of Agriculture, Department of Education, Coordinator of Inter-American Affairs, National Resources Planning Board, Chamber of Commerce of the United States, Foreign Policy Association, Council on Race Relations, Council for Social Action, World Peace Foundation, Y. M. C. A., Oxford University Press, British Information Service. These pamphlets deal with a variety of topics such as the progress of the war, post-war planning, inflation, Latin America, and many social and educational problems.

It has been the practice for some years to distribute library catalogues or finding lists and publications of the character referred to at cost. These operations do not increase the burden of taxation; on the contrary, they effect economies in the administration of the library by reducing the cost of handling the circulation of such matter for temporary use outside of the reading-rooms. The free withdrawal of these involves maintenance of records of withdrawal and return, and wear and tear, all of which are avoided by their sale at cost. Nevertheless, a sufficient number of copies of such publications are kept in the library for free use in the reading-room or for free withdrawal upon request. A person may elect to borrow a pamphlet for his use, without charge, or to purchase it at cost.

Under the circumstances disclosed no inhabitant of the city of Chicago who is entitled to the free use of the library and reading-room is deprived of that right by the operation in question and no taxpayer can complain of such conduct when it inures to his benefit rather than to his injury. (*City of Chicago v. Union Building Association*, (1882) 102 Ill. 379, 398; *Seager v. Kankakee County*, (1882) 102 Ill. 669; *Schumacher v. Klitzing*, (1933) 269 Ill. App. 60.)

However, since the Board of Directors questions its powers it becomes necessary to examine the Act of its creation and any pertinent decisions of the courts which may shed some light upon the purposes of free public libraries.

The Chicago Public Library was established by authority of an Act of the General Assembly of Illinois approved March 7, 1872 entitled, "An Act to authorize cities, villages, incorporated towns and townships to establish and maintain free public libraries and reading rooms." (Laws of 1871-2, page 609.) It was passed as an emergency measure to take effect at once because, as stated in the concluding section of the Act, all libraries of Chicago were destroyed by the recent fire in that city, and

large donations of books had been made to found a free library, and there was no suitable building or organization to receive or preserve them. This Act has been amended from time to time but no change was made which affected the powers of the Board of Directors, subject to this inquiry. These are stated in the broadest possible language. "They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the library and reading room as may be expedient, not inconsistent with this Act. They shall have the exclusive control of the expenditure of all moneys collected for such library * * * and shall, in general, carry out the spirit and intent of this Act, in establishing and maintaining a public library and reading room." (Section 5, Chapter 61, Illinois Revised Statutes 1943.) Within this ambit there are no definite charter powers relating to the management or control of the library by the Board. Are the operations in question inconsistent with the provisions of the Act or are they in furtherance of the spirit and intent thereof? That is the only measure by which the power of the Board in respect to the subject matter under consideration can be determined.

Section 6 of the Act provides:

"Every library and reading-room, established under this act, shall be forever free to the use of the inhabitants of the city where located, always subject to such reasonable rules and regulations as the library board may adopt, in order to render the use of said library and reading-room of the greatest benefit to the greatest number; * * *"

It is the *use* of the library and reading-room which is provided free. Does the sale, not for gain or profit, of duplicate or extra copies of pamphlets interfere with or impair the free use of identical material in the library? Obviously not.

The practice complained of has been adopted by many public libraries throughout the country and a careful search does not disclose any case in which this practice was challenged in the courts. However, we have found three cases in various states which, to say the least, support our conclusion that such practice is not inconsistent with the maintenance of a free public library.

In *Webber Hospital Association v. McKenzie*, (1908) 104 Me. 520, 71 Atl. 1032, a bequest was made for the maintenance of a free hospital in Biddeford, Maine. One of the hospitals claiming to be entitled to the bequest was incorporated under a statute governing charitable and benevolent organizations and its purpose as stated in the charter was "for the support and maintenance of a hospital in Biddeford where the unfortunate may receive medical and surgical treatment and nursing." It performed the work of a public hospital where the poor and unfortunate were treated gratuitously, limited only by the amount of its resources. It was charged that not all hospitalization was free. The court interpreted the phrase "free hospital" used in the Will as follows, page 1035:

"Nor is the word 'free' used in the sense of without compensation from any one receiving its benefits. Such a hospital is practically unknown. Income may be received from such as are able to pay, and yet the hospital be free. The word is used in its equally well-known meaning as defined by Webster 'thrown open or made accessible to all.' This is also a well-recognized definition of the word in law: 'Open to all—public.' 14 Am. & Eng. Ency of Law, p. 527; Anderson, Law Dictionary; 'Open for the public use.' 20 Cyc. 841; Black's Law Dictionary; *Dugan v. Baltimore*, 5 Gill & J. (Md.) 357-375. It was therefore a public hospital 'where the unfortunate may receive good care and skillful treatment' that the testator had in mind. No charge should be made to those unable to pay, but this would not

prohibit receiving compensation from those who are able. It was to be open to all. The rich should not be turned away because of their wealth nor the poor because of their poverty. It should be free in the broadest sense."

In Re Petersen's Will, (1919) 186 Iowa 75, 172 N. W. 206, a question of exemption from inheritance taxes was involved. The statute exempted certain institutions in the State which were open to the free use of the public. A bequest was made to the American Institute for Scientific Research of New York City. The opinion proceeds upon the basis that the Institute made a charge for its services under certain circumstances. In deciding that notwithstanding this charge the Institute was still open to the free use of the public, the court said, page 207:

"The word 'free' as used in this statute does not mean that no Compensation is exacted for the benefits bestowed, but because they are open and free to all who desire to use them and derive through them the benefits which they are supposed to confer. They are free though they exact something to maintain and preserve their integrity and continuance."

Specifically bearing upon the interpretation of the phrase "free public library" is *Gregory's Book Store, Inc. v. Providence Public Library*, (1925) 46 R. I. 283, 127 Atl. 150. This was a bill in equity brought to restrain the giving of State aid to the defendant under a statute providing that the State Board of Education may pay a sum not exceeding \$500.00 annually to each free public library in the State. For many years the library had been granted State aid and no charge was made for the use of any books until 1922 when the library established a collection of duplicate books on recent fiction. For the use of these duplicate books, when taken from the library, a charge of two cents a day was made. The small sum of money received from the State had been used for the purchase of children's books, and not for the benefit of the duplicate collection. The contention was made by the plaintiff that the library was not free so long as it exacted a charge for any of its books. The court rejected this contention, page 151:

"Is the state board of education without authority to grant state aid to said library by reason of the fact that the library makes a charge for the use of the books in the duplicate pay collection, when taken from the library? Of every book contained in the duplicate pay collection, there is in the main collection at least one copy, which may be obtained by the public without charge. No charge is made for the use of the books in the duplicate pay collection, unless taken from the library. Probably all of the libraries receiving state aid have certain books, such as books of reference, etc., which may not be taken from the library. It has not been suggested that the 'free use' of said books is not secured 'to the people of the town and neighborhood,' etc. The purpose of the statute and the rule is that the state may, by rendering a small aid, increase the usefulness of libraries which are freely rendering a public service. The purpose of the statute is not to prevent libraries receiving state aid from, in any manner competing with the business of the complainants.

"Suppose it should be held that said library, in order to obtain state aid, must permit all books in the duplicate pay collection to be taken from the library without charge, what will be the result? Most of the books in said collection are books recently published, for which there is, for a short time, a considerable demand. Before the unusual demand ceases, the charge for rental usually pays for the cost of the book, which is thereafter placed in the free collection. If the library does not make a charge for the books in the duplicate pay collection,

it cannot be expected that the library will continue to maintain this collection, by purchasing several duplicate copies of recent books, to satisfy a temporary popular demand. The result will be that the chances of a person obtaining, within a given time, the free use of a copy of one of these books, will be greatly lessened, and the purpose for which the statute and rule were adopted would be frustrated. Taking a common-sense view of the problem, it must be said that the 'free use' of said library, as required by the statute, is secured to the public."

Implicit in the challenge against the power of the Board to continue its practice of distributing, at cost, extra copies of pamphlets procured for such purpose, is the adoption of a policy which is inconsistent with the intent expressed in Section 6 of the Library Act, "to render the use of said library * * * of the greatest benefit to the greatest number."

We invite your recurrence to the principles of the Ordinance of 1787 for the government of the Northwest Territory from which the State of Illinois originated. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." The Library Act was passed to encourage the means of education. That is the "spirit and intent" of the Act, referred to in Section 5. The Board may pursue any policy which, in its judgment, is best suited, under existing conditions, to carry out this spirit and intent.

In our opinion, it is not an abuse of the powers of the Board of Directors of The Chicago Public Library to hold for sale, at cost, for the convenience of the public, extra copies of publications kept in the reading-rooms for free use, if they are not readily available for purchase in common book stores or at newsstands.

REIMBURSEMENT OF COURT EXPENSE

(No. 10766—Alderman, 3rd Ward—J. F. G.—January 25, 1944.)

The City need not reimburse a Municipal Court Judge for expense arising from a mandamus suit to compel the Chief Justice of the Municipal Court to recognize his appointment for the remainder of the term.

Citations: 381 Ill. 173, 178.
381 Ill. 544.

OPINION OF FOREGOING SYNOPSIS

We have a letter from Mr. Prescott submitted by you on November 8, 1943 requesting the city to reimburse him for his expenses in the case of *People ex rel. Prescott v. Scheffler, et al.*, wherein Mr. Prescott secured a writ of mandamus to compel the Chief Justice of The Municipal Court of Chicago and other municipal officers to certify him to the pay roll as an associate judge of The Municipal Court of Chicago and to assign to him his duties as such judge.

It appears that Prescott was appointed an associate judge of The Municipal Court of Chicago by Hon. Dwight H. Green, Governor of Illinois, for an unexpired term commencing December 10, 1941 and ending December 7, 1946 to fill a vacancy caused by the resignation of the Hon. Edward S. Scheffler who was elected to the office of Chief Justice of The Municipal Court of Chicago on November 4, 1941, and received his commission from the Governor on November 18, 1941. Judge Scheffler tendered his resignation as associate judge of the Municipal Court, to take effect at once, by letter dated November 5, 1941. The record indicated that the resignation was received at the Governor's office on November 22, 1941. If the resignation had been accepted as tendered the Governor would have had no power to appoint a successor but having delayed the formal acceptance of the resignation until December 10, 1941, the unexpired term was claimed to be less than one year and the Governor issued a commission to Prescott as associate judge of the Municipal Court to fill the vacancy. Judge Prescott presented his commission to Justice Scheffler who refused to recognize the Governor's commission. Judge Prescott thereupon filed a petition for mandamus in the Supreme Court of Illinois to enforce his right to hold the office. The Supreme Court awarded the writ for the stated reason that the title to the office could only be determined in an appropriate proceeding *in quo warranto*; that the respondents, Justice Scheffler and the municipal officers of Chicago, had no power to determine for themselves whether the commission from the Governor, which was regular and valid on its face, was void and of no effect whatever. In concluding the Supreme Court said: "The acts of the respondents complained of were without warrant or lawful authority. The relator is entitled to the office to which he was appointed unless and until he is ousted in an appropriate proceeding *in quo warranto*." (381 Ill. 173, 178.)

Because Judge Prescott was obliged to establish his right to office by the mandamus proceeding in the Supreme Court he believes that he is entitled to the attorney's fees, printing costs, court costs, and expenses to Springfield incurred on account of this litigation, which he says amounts to a substantial sum of money.

If this claim were allowed it would establish a new and very dangerous precedent in the cost of litigation to the City of Chicago. In the history of this city many hundreds of claims for certification to office or to the pay rolls of the city or for restoration to civil service positions on account of alleged unwarranted action of municipal officers have been sustained by the courts in mandamus proceedings or in certiorari proceedings and never before has any demand been made by the successful litigants for reimbursement of the expenses of the litigation. Allowance of such claims would penalize the city for defending law suits without success and would discourage the Law Department of the city from interposing proper defenses to many cases instituted against the City of Chicago.

A party litigant is liable only for such costs as are fixed by statute or taxed by the court in the case disposed of. That is now firmly established by the recent case of *Ritter v. Ritter*. That case was decided by the Supreme Court of Illinois on January 19, 1943 and is reported in the same volume as the case of *People ex rel. Prescott v. Scheffler*, which was decided November 17, 1942 (381 Ill. 544.) In the *Ritter* case Mr. Justice Murphy, who delivered the opinion of the court, after reviewing a great many decisions upon the subject, concluded as follows (page 557): "We find no case in which a recovery such as the plaintiffs seek here has been allowed. The cases all confirm the rule that attorneys fees and expenses of litigation cannot be recovered in a subsequent suit as damages by a successful plaintiff who has been forced into litigation by reason of the defendant's wrongful conduct."

FORCIBLE ENTRY BY FIRE DEPARTMENT

(No. 10773—*Fire Commissioner—M. H. F.—April 12, 1944.*)

The fire department may make forcible entry into a building only when the emergency is such as to require summary action in order to protect life and property against imminent hazards of fire and explosion.

Citations:

Statutes: IRS '43, ch. 24, sec. 23-61, ch. 38, Div. 6, sec. 4.

Ordinances: Mun. Code, 51-102, 63-2, 90-4.

Cases: 105 Ill. 207, 212.

259 Ill. 391, 398.

273 Ill. 602, 615, 616.

OPINION OF FOREGOING SYNOPSIS

Your communication of March 29, 1944 states that since the OPA began to operate in restriction of gasoline your department has encountered considerable trouble with respect to the illegal storage of gasoline or other flammable liquids in buildings not licensed or equipped to handle such storage. You further state that upon the assumption that large amounts of gasoline illegally stored in buildings is a menace to the lives and property of the building occupants and occupants of adjoining buildings, you have been seizing the illegally stored flammable liquids and removing them to a safe place for subsequent disposition, and that in certain cases, the prompt and necessary action by members of your department to remove the flammable liquids illegally stored has involved the forcible entry into premises to abate the nuisance. Our opinion is requested concerning your right in making forcible entry into premises for the above mentioned purposes.

It being a well-recognized fact that gasoline and similar volatile and flammable liquids are highly flammable and explosive, numerous provisions of the Municipal Code of Chicago cover the matter of the storage and handling thereof in such manner as is calculated to neutralize the fire and explosion hazards. These provisions have been generally upheld by the courts.

Section 90-4 of the Municipal Code of Chicago provides that any building, place or premises perilous to life or property by reason of the construction of such building or the use of the building or its contents, or where conditions exist which would hamper or impede the fire department in combating a fire in or on the building, is declared to be a nuisance and the division marshal in charge of the bureau of fire prevention is empowered and directed to cause any such nuisance to be abated.

Specifically you inform us that the storage of flammable liquids referred to by you violates the following sections of the Code:

Section 51-102, which covers the matter of storage of flammable liquids in buildings and restricts such storage in frame buildings to a quantity not exceeding five gallons in sealed containers or safety cans, and in other buildings to a quantity not exceeding ten gallons in sealed containers or safety cans of not more than one gallon capacity.

Section 63-2 which prohibits multiple occupancies and, subject to certain exceptions, prevents a hazardous use unit in any building or other occupancy, for the purposes auxilliary to the hazardous use.

Nuisances have been classified by our Supreme Court in three categories: 1. Those which in their nature are nuisances *per se* or are so denounced by the common law or by statute; 2. those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, etc.; 3. those which in their nature may be nuisances but as to which there may be honest difference of opinion in impartial minds. (*Town of Cortland v. Larson*, (1916) 273 Ill. 602, 615-6.)

By Section 23-61 of the Revised Cities and Villages Act the City Council has the power to define, prevent and abate nuisances. This power authorizes the City Council to denounce conclusively only those falling within the first and third classes. As to those within the second class the power possessed is only to declare as nuisances such as are nuisances in fact. (*Town of Cortland v. Larson*, *supra*, p. 616.)

If a business, trade or property is not a nuisance *per se* but may become so under certain circumstances the ordinance defining the nuisance must be directed against the circumstances and not against the character of the business, trade or property. (*City of Bushnell v. C., B. & Q. R. R. Co.*, (1913) 259 Ill. 391, 398). City authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. (*North Chicago City Ry. Co. v. Lake View*, (1883) 105 Ill. 207, 212.)

While gasoline and other highly flammable liquids are not nuisances *per se*, there can be no question as to their hazardous nature. The Code provisions are directed against the methods employed by their owners in handling and storing the liquids. Handled or stored in manner or place contrary to the Code provisions, they become nuisances in fact, while not *per se*.

The summary abatement of nuisances by public authorities is a remedy which has ever existed and its exercise is not regarded as in conflict with constitutional provisions for the protection of the rights of private property.

Where the factual situation is such that in the unlawful storage of highly flammable liquids there is presented a case of imminent danger to life and property, and where delay in abating the nuisance might result in a serious catastrophe, our opinion is that you would be authorized to summarily abate the nuisance by removing the gasoline. It would be advisable before taking action to make a preemptory demand upon the owner to abate the nuisance. Where the owner cannot be found or in those cases where you are refused admittance to the premises, then in case you have reliable knowledge that the nuisance in fact exists and believe that delay in abating it would seriously endanger life and property, our opinion is that you would be authorized to make forcible entry and take such reasonable action as is necessary under the circumstances of the case. Abatement as a remedy is limited by its necessity, and unnecessary injury to private property should be avoided. In situations where the danger to life and property is not imminent, it would of course be proper to compel compliance with the Code provisions by less drastic action, utilizing your usual form of notices and prosecutions under the appropriate sections of the Code.

In those cases where the person responsible for the nuisance is subject to arrest for his acts your usual procedure would be to procure a warrant for his arrest or accomplish this result through cooperation with the police department. Section 4, Division VI, Criminal Code of Illinois, Chapter 38, Illinois Revised Statutes, 1943, provides that an arrest may be

made by a private person without warrant for a criminal offense committed or attempted in his presence. The term "criminal offense" includes misdemeanors as well as felonies. The Statute, however, does not authorize a private person to arrest another for violation of a municipal ordinance.

From what has been said herein it will, we believe, be apparent that when taking action to summarily abate nuisances you and the division marshal in charge of the bureau of fire prevention should have a clear understanding of the facts of the particular case, and that you should exercise a sound discretion when determining whether a nuisance actually exists and whether the emergency is such as to require forthwith abatement by summary action in order to protect life and property against imminent hazards of fire and explosion.

As the hoarding of gasoline may be found to be violative of OPA regulations, the thought occurs to us that you should be entitled to the coordinated assistance of the Administration's local agents when coping with those problems presented by the unlawful storing of gasoline.

COMMISSIONS OF CITY CLERK

(No. 10776—City Council—L. L. K.—April 18, 1944.)

The City Clerk in selling hunting and fishing licenses does so as agent for the State and the commissions from these sales are his and he may retain them as his own.

Citation: Appellate Court No. 42267.

Statute: IRS '43, ch. 24, par. 172.

OPINION OF FOREGOING SYNOPSIS

This suit was a mandamus proceeding to compel the City Clerk to pay into the city treasury commissions which he had received from the State for the issuance of fishing and hunting licenses during the years 1939 and 1940. He had issued 72,991 fishing licenses in 1939 and 79,705 in 1940 and 44,539 hunting licenses in 1939 and 47,779 in 1940. In accordance with the provisions of the Fish and Game Codes he had deducted as commissions \$7,300.00 for fishing licenses in 1939, \$7,970.65 for fishing licenses in 1940, \$11,142.00 for hunting licenses in 1939 and \$11,951.25 for hunting licenses for 1940, an aggregate of \$38,363.90. He had expended the sum of \$13,931.12 in connection with the issuance of these licenses, and retained net compensation in the sum of \$24,432.78. The Superior Court ordered the writ of mandamus to issue directing the payment into the city treasury of the gross commissions collected for the years 1939 and 1940 and thereafter.

The Appellate Court on April 6, 1944 in its decision in this case reversing the judgment entered by the Superior Court of Cook County, holds that the City Clerk has a right to retain as his own the fees for issuing fishing and hunting licenses. The opinion is a lengthy one covering twenty-nine (29) typewritten pages. Briefly, the court holds that the City Clerk does not sell fishing and hunting licenses in his capacity as City Clerk. Under the Fish and Game Codes of Illinois he becomes the agent for the state in selling such licenses and by the statutes the com-

missions or fees for selling such licenses belong to him personally and not to the office of the City Clerk.

The court analyzes the provisions of the Fish and Game Codes in connection with paragraph 172 of the Cities and Villages Act which limits the compensation of city officials to their salaries, and concludes that there is no conflict between them. The court states that if there were any conflict between these provisions the construction and interpretation by the city officials since 1907 that these fees were the personal property of the clerk and need not be turned over to the city treasury should be accorded great weight by the court. The opinion points out how a ruling requiring these fees to be paid into the city treasury would, in view of this long established administrative construction, result in great hardship to the incumbent and his predecessors who have treated these funds as their own without objection from the city officials and who would be seriously injured financially if they were now compelled to pay these fees into the city treasury. The court also points out that the expenses of the incumbent incurred in the sale of these licenses were paid by him and not by the city; that for the years 1939 and 1940 these expenses amounted to \$13,931.12; that were the City Clerk to be charged with these expenses personally while the receipts from the fishing and hunting licenses were to be paid into the city treasury, his salary would be in effect reduced those years from \$8,000.00 to \$1,000.00 a year. The court concludes that such a result was not intended by the legislature or contemplated by the city council. The court stresses the fact that the defendant did not use the facilities of the office of the City Clerk nor any of its employees or materials in connection with the issuance of these licenses but that he hired his own help and he paid his own expenses.

It is the conclusion of the court that any change in the compensation provisions of the Fish and Game Codes to divest the City Clerk of his right to the fees for issuing licenses is a matter for the consideration of the legislature and not of the courts.

USE OF ILLINOIS AND MICHIGAN CANAL FOR REFUSE DISPOSAL

(No. 10779—*Commissioner, Streets and Electricity*—M. J. N.—April 19, 1944.)

The City may secure sites for refuse disposal through condemnation proceedings.

The use of the Illinois and Michigan Canal could only be justified by an order of the Department of Public Works and Buildings of the State of Illinois to build a superhighway and the filling-in of the channel for that purpose. If the project was abandoned the City would then be bound to restore the channel to its former navigable condition.

Citations:

Statutes: IRS '41, ch. 38, par. 466a.

Cases: 313 Ill. 408, 417.

Other references: 21 Op. Corp. Coun. 274.

OPINION OF FOREGOING SYNOPSIS

We reply to your inquiry in which you ask for an opinion on the following two questions:

1. Is it legal and practicable for the city to secure sites for refuse disposal through condemnation proceedings?
2. Is there any way the city can use the Illinois and Michigan Canal for a dumping site?

Your first question was tested in the case of *Consumers Co. v. City of Chicago*, 313 Ill. 408 (1924), in which case the city attempted to acquire, by condemnation proceedings, the stone quarry bounded by Huron street, Campbell avenue, Grand avenue and Rockwell street. This was done pursuant to the passage of an ordinance on June 13, 1923, in which the City Council authorized and directed the Comptroller to negotiate the purchase of the quarry for \$300,000 and in which it declared the property to be "useful, advantageous and desirable to the City of Chicago for a site for dumps, waste disposal stations and incinerators", and provided that if no agreement with the owners was made, condemnation proceedings should be instituted to acquire the property for the purposes mentioned.

The Supreme Court in that case, at page 417, held:

"The power to remove and dispose of garbage, refuse and other waste includes the power to create and use the necessary means effectually to accomplish the purpose. * * * Moreover, the city is expressly empowered to acquire and hold real and personal property for corporate purposes. * * * Hence the ordinance of June 13, 1923, is valid and appellees have the power to acquire land for the purposes therein stated."

It is, therefore, our opinion that it is legal for the city to secure sites for refuse disposal through condemnation proceedings.

It is well, however, that we call your attention to the following section of chapter 38, par. 466a, Ill. Rev. Stat. (1941).

"It is unlawful for any person to dump or place any garbage or other offensive substance within the corporate limits of any city, village or incorporated town other than the city, village or incorporated town within the corporate limits of which, such garbage or other offensive substance shall have originated nor shall any such garbage or other offensive substance be dumped or placed within a distance of one mile of the corporate limits of any other city, village or incorporated town."

Answering your second question we call your attention to the opinion rendered by this department on September 9, 1941, covering the entire question of dumping in the channel of the Illinois and Michigan Canal (Opinions of the Corporation Counsel and Assistants, Vol. XXI, page 274, *et seq.*). It is there pointed out in *that opinion* that in 1919 the legislature of the state of Illinois passed "An Act in relation to the Illinois and Michigan Canal and the canal lands, the protection, preservation and disposition thereof, and to repeal all Acts and parts of Acts in conflict therewith". (Laws of Illinois, 1919, page 976; Ill. Rev. Stat., 1937, Chap. 19, Secs. 32-3); that the Act was approved June 18, 1919 and went into force July 1, 1919. Under this statute on February 5, 1934 the City of Chicago was enjoined from encroaching upon "the right of way of the Illinois and Michigan Canal" and from "dumping rubbish, tin cans, ashes and other

waste materials in said right of way," by a decree entered by Judge Joseph Burke in the case of *The People of the State of Illinois, ex rel. Otto Kerner, Attorney General, and Robert Kingery, Acting Director of the Department of Public Works and Buildings of the State of Illinois v. The City of Chicago*, General Number B-282869 in the Circuit Court of Cook County.

In that opinion we reached the conclusion that the Department of Public Works and Buildings of the State of Illinois can validly provide for the construction of a superhighway on the channel of the Illinois and Michigan Canal and can permit the filling of the channel for that purpose, subject to the following conditions:

If the action as here indicated were taken by the state legislature without action by the Congress, or if in pursuance of the provisions the act as it now reads the limited consent of the Congress of the United States to construct a road upon the channel of the canal were secured, any dumping in the channel could be justified only by the eventual construction of a highway. If the highway project, after the dumping was done, were not consummated there would be a resulting obligation to restore the original navigable capacity of the channel of the canal for waterway purposes.

The power of the Department of Public Works and Buildings of the State of Illinois to provide for the construction of a superhighway on the channel of the Illinois and Michigan Canal and to permit the filling of the channel for that purpose, when exercised pursuant to proper legislative action and authority, could be carried into effect by a modification of the injunction, and the injunctive order heretofore entered against the city and this modification could be accomplished by a decretal provision excepting from its scope any dumping or filling which shall be done in preparation for the construction of a superhighway upon the channel of the Illinois and Michigan Canal.

STUDENT INJURIES

(No. 10795—Alderman, 17th Ward—C. N.—June 15, 1944.)

The City of Chicago is not liable for the injuries of a student sustained in a public school classroom.

Citations:

Case: 171 Ill. 332, 335, 336.

Other reference: 20 Op. Corp. Coun. 118.

OPINION OF FOREGOING SYNOPSIS

We have your letter of June 6, 1944 in which you describe the circumstances under which Joan Rutan, a minor, was injured while attending classes at the Yale School. You explain that the classroom is located directly beneath the Auditorium of the school which was being used as a gymnasium at the time the accident occurred. It seems that the activities in the gymnasium caused plaster to fall into the classroom; that the child was struck by this falling plaster and taken to a hospital in an unconscious condition. You ask for an opinion as to whether the City of Chicago is liable for the injuries she sustained.

"It (a board of education) is simply an agency of the State, having existence for the sole purpose of performing certain duties

* * * and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages * * *."

"The erection of the school building was of no benefit to the city as a municipality, and whatever connection it had with the board of education in the matter of constructing the building was simply for the purpose of discharging a public duty cast upon it by the law-making power of the State. That duty * * * is governmental in character and nature. * * * the doctrine of respondeat superior is not applicable against the city."

Frank T. Kinnare, Admr. v. The City of Chicago, et al., 171 Ill. 332, at pages 335 and 336 (1898).

On December 18, 1939 we rendered Opinion No. 10159 for the Committee on Consolidation, Reorganization and Taxation, (a digest of which can be found at page 118, volume XX, Opinions of the Corporation Counsel and Assistants), in which we discussed the relation of the Board of Education to the city and set forth that under existing law, the Board of Education is a separate corporation distinct from the city and that when city officers levy special school taxes or do other acts under the school law, they are acting as agents of the Board of Education and not as agents of the city in its corporate capacity.

Because of this distinct corporate functioning of the Board of Education, in all cases when the city erects schools for the public school system the property is held in trust for the use of the Board of Education, a separate municipal corporation.

We are of the opinion, therefore, that the City of Chicago is not liable for the personal injuries described.

CITY WATER FOR NON-RESIDENTS

(No. 10847—Chairman, Finance Committee—M. H. F.—June 8, 1945.)

The City of Chicago can sell water outside its corporate limits to private persons or corporations, and the City can properly charge such persons or corporations rates higher than it charges its own consumers.

Citations:

210 Ill. 290.
304 Ill. 212, 216.
366 Ill. 526.

Statutes:

IRS '43, ch. 24, secs. 23-14, 23-35, 23-36, 23-37.
IRS '43, ch. 24, secs. 49-1 to 49-4.
IRS '43, ch. 24, secs. 61-1, 61-20.
IRS '43, ch. 24, secs. 77-1, 77-7, 79-1, 79-3, 82-1.
IRS '43 ch. 42, sec. 26.
IRS '43, ch. 24, secs. 79-1, 79-3.
IRS '43, ch. 24, sec. 82-1.

Cases:

210 Ill. 290.
304 Ill. 212, 216.
366 Ill. 52.

Other reference: 15 Op. Corp. Coun. 628.
18 Op. Corp. Coun. 28, 29.
21 Op. Corp. Coun. 256.

OPINION OF FOREGOING SYNOPSIS

Your communication of May 31, 1945 states that your committee has pending before it several proposed council orders to authorize the Commissioner of Public Works to permit individuals living in unincorporated territory adjoining the City of Chicago to tap city water mains and to make connections with existing city sewers, and you request our advice as to whether (1) the city is required to supply water to such individuals and (2) if so, would it be required to charge the same rates as it does to its city customers, and (3) whether the city may legally permit such individuals to connect their sewer drains to the city sewers.

We assume for the purpose of this opinion that the properties of the persons concerned are situated within the state of Illinois.

Among the powers expressly granted by statute to municipalities in Illinois are the following:

"To regulate the openings in streets and other municipal property for the laying, building, repairing, and removing of * * * water mains and pipes, sewers, tunnels, and drains; * * *." (Section 23-14, Revised Cities and Villages Act.)

"To construct, repair, and regulate the use of * * *, drains, sewers, * * *." (Section 23-35.)

"To regulate the construction, repair and use of * * * drains, and sewers." (Section 23-36.)

"To contract with the State of Illinois, any municipality, or any person for the collection and disposal of sewage originating outside of municipalities." (Section 23-37.)

To acquire, construct, own, and operate any public utility for the sale, delivery, or furnishing of cold, heat, light, power, water, etc., the product or service of which, or a major portion thereof, is to be supplied to the municipality or its inhabitants, and to contract for, purchase, and sell to private persons or corporations the product or service of such utility, and to fix the rates and charges for the products sold and the services rendered by any such utility, and to make all needful rules and regulations in relation thereto. (Sections 49-1, 49-2, and 49-3.)

With referendum and approval of the electors of the municipality, to sell water within and without the corporate limits of the municipality from any water plant owned and operated by the municipality. (Section 39-4.)

To levy and collect a tax on real and personal property in the city for the laying and maintenance of sewers in the city. (Section 61-1.)

To make sewerage contracts with adjacent municipal corporations. (Section 61-20.)

Subject to referendum, to tax for the purchase, construction or enlargement of water-works. (Section 77-1.)

To fix the water rentals or rates to be charged for the furnishing of water. (Section 77-7.)

To purchase, construct, or improve water-works, and to issue revenue bonds. (Sections 79-1 and 79-3.)

To levy and collect a tax for the extension of water mains or pipes in the city and for the maintenance of its water-works system, and for the creation of a city water fund. (Section 82-1.)

It is a fundamental proposition of municipal law that powers granted to a municipality, unless otherwise expressly so stated in the grant of power, may be exercised only within the corporate limits of the municipality.

City of Rockford v. Hey, (1937), 366 Ill. 526.

Under Section 26 of the Chicago Sanitary District Act, Chapter 42, Illinois Revised Statutes, as interpreted by the Supreme Court of Illinois in the case of *City of Chicago v. Town of Cicero* (1904), 210 Ill. 290, the City of Chicago is required to furnish water to municipalities within the Sanitary District which do not own systems of water-works, at the city's boundary, in such quantities as may be required to supply consumers within their territories, at no greater rate than the city charges and collects of consumers within its limits for water furnished through meters in like large quantities. There is, however, nothing contained in the act which requires the city to furnish water to private persons or corporations outside the corporate limits of the city. (Opinions of the Corporation Counsel, Volume XVIII, pages 28, 29; Volume XXI, page 256.) This answers your first inquiry.

As the City of Chicago is expressly authorized to sell water without its corporate limits to private persons or corporations, it may in our opinion negotiate a contract with such persons to supply them water from its water plant. (Opinions of the Corporation Counsel, Volume XXI, page 257.) If it should see fit to make a sale of city water to such persons, it would not be required to furnish the water at the price or rate it charges and collects of consumers within its corporate limits, but in our opinion it could properly charge such outside private persons or corporations rates higher than it charges its own consumers. What these larger rates should be would, as we view the matter, be for the determination of the city council in the exercise of its sound discretion, taking into consideration the attending facts and circumstances. That the charges should not be less than those fixed by ordinance of the city for Chicago consumers is obvious, as this would be prejudicial to Chicago consumers of water. It is our thought that the charges should be substantially higher than ordinance rates, so as not to discriminate against Chicago water users. It would not seem to be to the best interests of Chicago and its citizens that persons seeking to avoid city taxes by building apartments and factories just beyond the city's limits should be encouraged by giving them the same benefits of low-cost water and sewer service, fire protection, etc., enjoyed by Chicago taxpayers. This should serve to answer your second query.

As to whether the city may legally permit the individuals mentioned in your communication to connect their sewer drains to the city sewer, the question is more difficult of solution.

Manifestly it would be prejudicial to the City of Chicago and its taxpayers were owners of property located without the corporate limits of the city to be permitted under ordinary circumstances to connect their sewer drains to the city sewers without paying to the city reasonable compensation for the privilege. (*Carr v. City of Athens* (1922), 304 Ill. 212, 216.)

The question now under consideration was presented to the department in the year 1923 and again in 1927. In an opinion given the then Commissioner of Public Works, Opinions of the Corporation Counsel, Volume XV, page 628, reliance was placed upon our former opinion rendered such official July 23, 1923. It was said that there is some doubt whether it would be lawful to permit the owner of property outside the city limits to use the city's sewers without compensation, but the conclusion was reached that the use might be permitted by contract made pursuant to proper legislative action in the form of an ordinance.

Taking these opinions into consideration and also the express provision contained in Section 23-37 of the Revised Cities and Villages Act, which authorizes the city to contract with any person for the collection and disposal of sewage originating outside the municipality, our conclusion is that it would not be illegal for the city to authorize one or more of the individuals mentioned in your letter to connect their sewer drains to the city sewers, upon payment of adequate compensation for such privilege. Such permission should be authorized by ordinance, rather than council order. The advisability of making the permission terminable at the option of the city council upon reasonable notice should we believe be given consideration.

RIDING CITY TRUCKS

(No. 10902—Service Shops, Foreman—J. H. S.—June 4, 1946.)

There is a prohibition against laborers riding on the outside or steps of City-owned trucks.

Citations:

Statute: IRS '45, Ch. 95½, par. 190(a).

Ordinance: Municipal Code, 27-58.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of May 20, 1946 inquiring whether there are any state regulations or laws prohibiting laborers from riding on the outside or steps of a city owned truck, or limiting the number of passengers allowed to ride with driver inside the cab. You also ask if there is any personal responsibility on the part of the city driver. You state that it is sometimes necessary for street patching work and also at times in garbage and ash collection that a laborer ride on the outside of the truck. Adequate handles are provided and steps must be in good condition.

The question relating to the number of passengers allowed to ride with the driver inside the cab is completely answered by section 93(a) of the Uniform Act regulating traffic on highways (Ill. Rev. Stats. 1945, chap. 95½, par. 190(a)) which provides:

"No person shall drive a vehicle when it is so loaded, or when there are in the front seat such number of persons, exceeding three, as to obstruct the view of the driver to the front or sides of the vehicle or as to interfere with the driver's control over the driving mechanism of the vehicle."

A violation of the foregoing section of the statute will subject the driver to the penalties provided by the Act. These penalties are a fine of not less than five dollars nor more than one hundred dollars for the first offense, a fine of not less than twenty-five dollars nor more than two hundred dollars for a conviction within a year after the first offense, and a fine of not less than one hundred dollars nor more than three hundred dollars for a third conviction within one year after the first conviction (Ill. Rev. Stats. 1945, chap. 95½, par. 234.)

The matter of riding on the outside of the truck is covered by section 27-58 of the Municipal Code of Chicago which provides:

"It shall be unlawful for any person to ride upon the fenders or running board, or outside steps of any vehicle. This provision shall not apply to an employee engaged in the necessary discharge of duty."

Accordingly, there appears to be no prohibition against laborers riding on the outside or steps of a city owned truck while in the actual performance of their duties.

In the event of injury to the person who is riding on the outside of the truck, his right to recover is limited to a claim against the city under the Workmen's Compensation Act. He has no right of action against the driver of the truck.

REVOKING LICENSE FOR RACIAL DISCRIMINATION

(No. 10949—Executive, Commission on Human Relations—J. F. O.—
March 10, 1947.)

The Mayor of Chicago can revoke the license of a city roller rink that refuses to admit Negroes. Such practice is in violation of State Statute and the Municipal Code of Chicago.

Citations:

Statute: IRS '45, Ch. 38, Sec. 125.

Ordinance: Municipal Code, 101-27.

OPINION OF FOREGOING SYNOPSIS

In your letter to the Corporation Counsel dated January 27, 1947, you request an opinion as to the power of the Mayor to withhold, revoke or suspend the city license of the White City Roller Rink for refusing to admit Negroes into the rink because of their race.

Among the general licensing provisions of the Municipal Code of Chicago is the following:

"101-27. The Mayor shall have power to revoke any license issued under the provisions of this code for good and sufficient causes.

If at any time after the granting of any license, any licensee shall have violated any of the provisions of this code or any of the statutes of the State in the conduct of his business, the Mayor may revoke the license therefor."

Section 125, Chapter 38 Illinois Revised Statutes of 1945 provides the following:

"All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of * * * skating rinks * * * and all other places of public accommodations and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens * * *."

Accordingly, it would seem clear that if any person holding a license from the City of Chicago violates the State statutes or Municipal Code in the conduct of the business for which the license was issued, said license is subject to revocation by the Mayor.

LIBRARY FUNDS

(No. 10953—Board of Directors, Public Library—J. F. G.—March 20, 1947.)

There are no legal restrictions against the Chicago Public Library appropriating money from the library maintenance and operation fund for the employment of qualified persons to promote the maintenance of musical, literary and other educational programs.

Citations:

Statute:	IRS '45, Ch. 81.
Cases:	42 Ill. 9.
	258 Ill. 494, 496.
	369 Ill. 280.
	168 Ind. 94, 97.

OPINION OF FOREGOING SYNOPSIS

We have a letter from your librarian dated February 18, 1947 which reads in part as follows:

"By order of the Board of Directors of the Chicago Public Library, I respectfully submit the following question with the request for an official opinion for the guidance of the Board:

"Has the Public Library the right under the Illinois Library Act (Revised Statutes, Ch. 81) to employ qualified persons to prepare and conduct musical, literary and other educational programs in library buildings and free to the public; and to pay such persons for their services from its income derived from the tax levy for maintenance and operation provided for in the Library Act, or are such programs—particularly when paid for from the tax levy fund—unlawful and *ultra vires*?"

We have had occasion to discuss your powers in an opinion dated January 18, 1944 upon the subject of the sale of pamphlet publications. We then said that there are no specific charter powers governing your board. We adverted to the ordinance of 1787 for the government of the

Northwest Territory and concluded that "the spirit and intent" of the act authorizing municipalities to establish and maintain public libraries was to carry out the precept and mandate of the territorial charter that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged". At the time we had not encountered any judicial opinion indicating what is the basic public purpose of a tax supported library. In the preparation of this opinion we found only one case touching upon the subject which justifies our reference to the ordinance of 1787. In *School City of Marion v. Forrest* (1906) 168 Ind. 94, 97, the Supreme Court of Indiana discussed this subject as follows:

"That article (of the State Constitution) provides: 'Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all.' It may, with propriety, be said that a law providing for the organization and maintenance of public libraries is a part of the educational system of the State, and that boards organized under the provisions of said act exercise the whole power of the municipality in respect to public libraries."

There seems to be no other judicial precedent for a definitive statement of the province of a public library. Our own Supreme Court held in *Johnston v. City of Chicago* (1913) 258 Ill. 494, 496, that the library board is but a part and parcel of the city government. Hence, it may be said of your body that it may exercise the power of the city to expend funds raised by taxation for any public purpose which is fairly related to the education of the inhabitants of the city.

It has been said repeatedly that the words "corporate purpose" should not receive a narrow or rigid construction; that a tax for a corporate purpose may be defined to mean a tax to be expended in a manner which shall promote the general prosperity and welfare of the community which levies it (*Taylor v. Thompson* (1866) 42 Ill. 9; *The People v. Kelly* (1938) 369 Ill. 280).

A public library is more than a repository of books in custody of caretakers and clerks. It is an institution for public service. The activities of a public library are not static. They grow by custom and experience. The report of the New York Public Library for 1944 is illuminating. There may be found story telling activities, exhibitions of art, phonograph collections and musicales. There is attached to your librarian's inquiry a list of activities indicating that for many years the Chicago Public Library has conducted regular weekly programs of book reviews, current event discussions and recorded music concerts; that your library and many other public libraries have available for circulation phonograph records, lantern slides, mounted pictures, and music scores in addition to its books and other like printed matter.

In an authoritative book upon the government of the United States by William Bennett Monro, of California Institute of Technology, published in 1946, it is said (p. 795):

"The public library is becoming a more effective agency of public education that it used to be. A generation ago it was merely a depository of books; today it has become, in many cities, an active agency of public enlightenment. It renders informational service to public officials, business organizations, newspapers, authors, and students of every subject. Illustrated lectures are often provided;

reference rooms are maintained with intelligent attendants; seekers of books are sometimes permitted to browse among the shelves; the whole atmosphere of a well-managed public library has now become surcharged with a spirit of active service."

Where the library facilities are large and the works of art, literature, science and other subjects are numerous a public library cannot perform its functions properly unless it provides for its patrons guidance in the various fields of knowledge and culture with which it is concerned. Such guidance is customarily provided by publication of catalogs and other reference data, by exhibitions and by personal counsel. If librarians and assistants may be employed to advise and direct individuals who seek knowledge or information what law can be invoked to prevent such guidance and direction for a group of library patrons? So the bridge is crossed from personal counsel to public lectures and musicales to impart knowledge and stimulate an appreciation of the fine arts.

There are no legal restrictions against the Chicago Public Library becoming the center of culture in the city and we are of the opinion that appropriations may be made from the library maintenance and operation fund for the employment of qualified persons to promote such purpose.

CITY FIREMAN—OUTSIDE WORK

(No. 10962—Alderman, 39th Ward—C. H. L.—May 1, 1947.)

Unless the ordinance defining the service and appropriating the compensation therefor, or the Civil Service Commission's classification of or examination for, the service indicates otherwise, the presumption of law is that a city employee, a fireman in this case, must devote his entire time to the City during its regular business and working hours, and cannot engage in any outside employment at the same time.

Citations:

Ordinance: Municipal Code, 12-33, 25-9.

Cases: 216 Ill. 466.

222 Ill. 63, 66.

Other reference: 15 Op. Corp. Coun. 339.

OPINION OF FOREGOING SYNOPSIS

We have your letter of April 28, 1947 in which you ask if a city fireman is permitted to do other work in addition to work for the city.

The Municipal Code of Chicago, Chapter 12, Sec. 33 and Chapter 25 Sec. 9 provide as follows:

"12-33 The chief fire marshal shall, subject to the approval of the fire commissioner, arrange the working hours of the members assigned to the bureau of fire control and extinguishment in such manner that no member shall be required to be on duty more than twenty-four hours in any consecutive forty-eight hours; provided, how-

ever, that the chief fire marshal or any of his aides acting in his official capacity may in case of serious conflagration or other emergency, require the members assigned to the said bureau to be on duty or continue on duty during the period of such emergency."

"25-9 Eight hours of labor shall be and constitute a day's work for all employees performing manual labor for the city. The provisions of this section shall not be construed to apply to or govern the police or fire departments or any department or workshop where constant operation is necessary. * * *

Although the Civil Service Act does not require the Civil Service Commission to specify, in written rules, every case which shall be deemed cause for removal (*Joyce v. City*, 216 Ill. 466; *Kammann v. City*, 222 Ill. 63, 66), we call your attention to two rules of the Rules and Regulations of the Chicago Fire Department the violation of which would be cause for discharge of a fireman, viz.

Sec. 371. Absence from duty without permission.

Sec. 372. Leaving a post of duty without being properly relieved.

In conclusion we quote from an opinion written by this department to Hon. Nicholas R. Finn, President, Civil Service Commission on September 22, 1926, Corp. Coun. Op. Vol. XV, Page 339, in which opinion we now concur:

"Complying with your request for an opinion in the matter of the right of civil service employees to engage in outside employment while filling an office, position or place of employment in the service of the city, we state it as our opinion that, unless the ordinances defining the service and appropriating the compensation therefor, or the Civil Service Commission's classification of, or examination for, the service indicates otherwise, the presumption of law is such employee must devote his entire time to the city during its regular business and working hours. Such employee cannot, therefore, engage in outside employment at the same time."

PURCHASING AGENT'S AUTHORITY

(No. 10999—Chairman, Committee of Central Purchasing—A. J. R.—October 10, 1947.)

A. The Municipal Purchasing Act does not give the Purchasing Agent authority over purchases of the Board of Election Commissioners.

B. The Purchasing Agent has authority over the purchases of the Chicago Welfare Administration.

C. Purchasing Agent has authority over the purchases of the Municipal Court of Chicago.

D. The heads of the several City departments bear a responsibility with reference to appropriations made to their departments;

they are primarily responsible for the use of their appropriations and the comptroller would not be warranted in charging their appropriations with expenditures in which they were not shown to have concurred.

E. The aggregate of detailed departmental appropriations for materials and supplies cannot be accumulated in a "purchase fund" which would become an appropriation for the Purchasing Agent.

F. Under the Purchasing Act all vouchers must continue to be approved by the Directors of the Municipal Tuberculosis Sanitarium before payment can be made.

G. The phrase, "necessary attachments" as used in the Purchasing Act means necessary attachments to the purchase order or contract.

Citations:

127 Ill. 231.	191 Ill. 257.
134 Ill. 66.	241 Ill. 177.
152 Ill. 546.	263 Ill. 172, 177.

OPINION OF FOREGOING SYNOPSIS

You have submitted to us, for our opinion on each, eight questions relating to the application of the new "Municipal Purchasing Act for Cities in excess of 500,000 population." We shall reply to your questions in the order in which you present them.

1.

Your first question is whether the act gives the Purchasing Agent authority over purchases for the Board of Election Commissioners.

The appointment, powers, duties, functions and expenditures of the Board of Election Commissioners are governed by the City Election Law which consists of three of the thirty articles of the Election Code of Illinois. This Code is a separate Act from the Revised Cities and Villages Act. By Section 16-5 the Commissioners are given charge of printing and furnishing ballots, by Section 16-9 they are required to print and distribute instructions to voters and by Section 17-8 they are obliged to provide polling places, voting booths, and supplies. The title of the Municipal Purchasing Act is "An act to amend Sections 23-100, 58-1, 59-4, 63-7 and 72-6 of the 'Revised Cities and Villages Act', approved August 15, 1941, as amended, and to add Article 22a consisting of Sections 22a-1 to 22a-20 inclusive, thereto." Nothing in its terms purports to amend the City Election Law or the Election Code of Illinois.

We think it is significant that with reference to two other governmental agencies established by Acts other than the Revised Cities and Villages Act the legislature by separate Acts amends the separate Acts relating to them. Senate Bill 405 amends the Act providing for the establishment of houses of correction and Senate Bill 406 amends the Act for the establishment and maintenance of free public libraries. Both these classes of institutions were brought under the provisions of the Municipal Purchasing Act by the separate amending Acts. The legislature passed no such separate Act relating to the Board of Election Commissioners.

The Election Commissioners are appointed by the County Court. Their salaries are paid by the county. All expenses incurred by them are paid by the city. Their salaries and expenses are audited by the County

Judge. Their authority extends over the election of federal, state, county and municipal officers in four cities (Chicago, Chicago Heights, Berwyn and Harvey), one town (Cicero) and five villages (Summit, Stickney, Morton Grove, Elmwood Park and Skokie.) Allocation of election expenses among the county and the municipalities is provided for. The Election Commissioners have been held to be officers of the City of Chicago and the city has been held to be liable under the Workmen's Compensation Act for injuries to their employees. We think it is reasonable to suppose that the General Assembly elected not to add to this confusion when it refrained from placing the purchases and contracts of Board of Election Commissioners under the authority of the Central Purchasing Agent of the city.

2.

Your second question is whether the Act gives the Purchasing Agent authority over purchases for the Chicago Welfare Administration.

The Chicago Welfare Administration is created under a power granted by Section 23-104 of the Revised Cities and Villages Act "To relieve and support all poor and indigent persons lawfully resident in municipalities of more than 500,000 inhabitants." It is part of the city government, exercises a power conferred upon the city, its purchases and contracts are made by and on behalf of the city, and for these reasons the Municipal Purchasing Act must be held to confer upon the Purchasing Agent authority over purchases for the Chicago Welfare Administration.

3.

Your third question is whether the Municipal Purchasing Act gives the Purchasing Agent authority over purchases for the Municipal Court of Chicago. Section 7 of the Act providing for the establishment of the Municipal Court of Chicago (Smith Hurd Ill. Rev. Stat. 1945, Chap 37, Par. 362) provides as follows:

"That all blanks, books, papers, stationery and furniture necessary to the keeping of the records of the proceedings of such Municipal Court and the transaction of the business thereof, shall be furnished the officers of such court at the expense of the city. All other expenditures on account of such court which may be authorized by the city council and which are not specifically mentioned in this act, shall be paid out of the city treasury."

This provision places upon the City of Chicago an obligation the discharge of which is governed by the Revised Cities and Villages Act of which the Municipal Purchasing Act is an amendment. We find here a situation entirely different from that affecting the Board of Election Commissioners. To hold that the Purchasing Agent has authority over purchases and contracts of the Board of Election Commissioners would be to hold that functions required of them by the Election Code had been transferred to other hands by the Municipal Purchasing Act. With regard to the Municipal Court the function is already assigned to the city by the Municipal Court Act and its exercise must be governed by the Cities and Villages Act. There is no provision in the Municipal Court Act placing in the hands of others the functions which the Municipal Purchasing Act places in the hands of the Purchasing Agent. Since the Municipal Purchasing Act is an amendment to the Cities and Villages Act, the vesting of authority over purchases and contracts for the Municipal Court is accomplished without the amendment of any other Act. It is our opinion that authority over purchases and contracts for the Municipal Court is vested in the Purchasing Agent under the Municipal Purchasing Act.

4.

Your fourth question is whether the Comptroller could charge departmental appropriations for encumbrances or expenditures covering pur-

chases, etc. upon certification of the Purchasing Agent only without departmental approval.

Section 22-1 of the Revised Cities and Villages Act (Smith Hurd III. Rev. Stat. 1945, Chap. 24, Par. 22-1) provides:

"Appropriations shall be arranged according to funds and also according to departments and other separate agencies of the municipal government. The Appropriation Ordinance shall specify the objects and purposes for which appropriations are made and the amount appropriated for each object or purchase."

We believe that the heads of the several city departments bear a responsibility with reference to appropriations made to their departments; that they are primarily responsible for the use of those appropriations; and that the Comptroller would not be warranted in charging their appropriations with expenditures in which they were not shown to have concurred.

5.

Your fifth question is whether the aggregate of detailed departmental appropriations for materials, etc., could be accumulated in a "purchase fund" which would become an appropriation for the Purchasing Agent.

The provision of the Cities and Villages Act relating to appropriations, which we have quoted in our answer to your fourth question, plus the fact that the same section permits the city council by a two-thirds vote of all its members "to make transfers within any department or other separate agency of the municipal government" of sums of money appropriated for one corporate object or purpose to another corporate object or purpose," and does not authorize any transfer from one department to another, convinces us that the law requires the departmental appropriations for each department to be kept separate from appropriations for other departments, and that the accumulation with which your question is concerned is not permissible.

6.

Your sixth question is whether it will be necessary to have specific approval of the directors of the Municipal Tuberculosis Sanitarium for purchase orders or invoices or both covering materials, etc. for that institution. You state that it appears that at the present time all vouchers must be approved by the directors before payment can be made and that it would be preferable to send their purchase vouchers directly from the Purchasing Agent to the Comptroller and have him make payment immediately.

Section 72-6 of the Revised Cities and Villages Act (Smith Hurd III. Rev. Stat. 1945, Chap. 24, Par. 72-6) provides that the directors of the sanitarium have exclusive control of all money collected to the credit of the sanitarium fund and that all money received for the sanitarium shall be deposited to the credit of that fund and drawn upon by the proper municipal officer by properly authenticated vouchers of the sanitarium board. This section is amended by the Municipal Purchasing Act only to the extent of requiring that in cities of more than 500,000 population the Board of Directors of the sanitarium shall be governed by the provisions of the Municipal Purchasing Act in relation to the letting of contracts and purchase orders and in relation to the powers, functions and authority of the Purchasing Agent, the board of standardization and corporate authority in such cities. This amendment relates only to the letting of contracts and the making of purchases. We do not find in the Municipal Purchasing Act any provision which gives the Purchasing Agent authority over municipal funds or their disbursement, excepting the revolving fund provided for in the Act. While every purchase creates an obligation to pay

the purchase price, the making of the purchase and the payment of the price are functions separable from each other. In our opinion the Municipal Purchasing Act places the first function in the hands of the Purchasing Agent and, with the exception of the revolving fund, leaves the other in the hands of other officers of the municipal government. It is therefore our opinion that the provisions of Section 72-6 relating to the segregation, control and disbursement of the funds of the Municipal Tuberculosis Sanitarium and the Acts required of the directors of the sanitarium with reference to those matters, are not affected by the Municipal Purchasing Act.

7.

Your seventh question is whether the language of lines one to five of Section 22A-10 of the Municipal Purchasing Act as they appear in Senate Bill 407 in the House of Representatives means that the Mayor signs the award of a purchase order or contract or signs the order or contract itself. The language of Section 22A-10 involved in this question is that "the award of any contract involving amounts in excess of One Thousand (\$1000.00) Dollars shall be made by the Purchasing Agent after approval of the corporate authority by the affirmative action of a majority of all members elected thereto to the lowest or highest responsible bidder as provided in Section 22A-3 of this article and shall be signed by the Mayor or his duly designated agent, by the Comptroller and by the Purchasing Agent, respectively, of such municipality." The same section provides that "all purchase orders or contracts involving amounts of One Thousand (\$1000.00) Dollars or less shall be awarded by the Purchasing Agent to the lowest or highest responsible bidder as provided in Section 22A-3 of this article and shall be signed by the Purchasing Agent and by the Comptroller."

It is plain that a literal interpretation of the language in question would require the signatures of the Mayor or his agent and the Comptroller and the Purchasing Agent to a document other than a purchase order or contract where the amount involved is more than One Thousand (\$1000.00) Dollars. The question which we must decide is whether this literal interpretation must be adopted. We believe that this question must be decided in accordance with the rule expressed by the Supreme Court of Illinois in *Krome v. Halbert*, 263 Ill. 172 (1914) at page 177, as follows:

"It is an elementary rule of construction that all parts of a statute must be considered together and not each by itself. (Sutherland on Stat. Const., sec. 215; *Maiss v. Metropolitan Amusement Ass'n.*, 241 Ill. 177; *Soby v. People*, 134 id. 66.) In the construction of a statute the courts are not confined to a literal meaning of the words, but the intention may be collected from the necessity or objects of the act and its words may be enlarged or restricted according to its intent. A thing which is within the intention is regarded within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. The several provisions of a statute should be construed together in the light of the purpose and objects of the act, so as to give effect to the main intent, even though in so doing particular provisions are not construed according to their literal meaning. *People v. Harrison*, 191 Ill. 257; *People v. City of Chicago*, 152 id. 546; *Cruse v. Aden*, 127 id. 231; Sutherland on Stat. Const. sec. 218."

The result of a literal interpretation of the language of Section 22A-10 would mean that the legislature requires the signatures of the Mayor or his agent and the Comptroller and the Purchasing Agent to an award of a contract involving more than One Thousand (\$1000.00) Dollars but does

not require their signatures on the contract itself. There is no provision requiring these signatures to the contract if the language here in question does not require them. There is an express requirement of certain signatures to all purchase orders or contracts involving amounts of One Thousand (\$1000.00) Dollars or less. We do not believe it was the intention of the legislature to provide for the execution of the contract or purchasing order in the latter case and to make no provision with reference to the more important matter of the execution of a contract involving more than One Thousand (\$1000.00) Dollars. It is our opinion that a fair interpretation of the entire section requires us to conclude that all purchase orders or contracts involving amounts of One Thousand (\$1000.00) Dollars or less must be signed by the Purchasing Agent and by the Comptroller and that in the more important matter of contracts involving in excess of One Thousand (\$1000.00) Dollars there must be added to these signatures the signature of the Mayor or his agent.

Indeed, a literal interpretation of the language in question would lead to an absurdity which the interpretation that we give to it avoids. It provides that the award of a contract involving more than One Thousand (\$1000.00) Dollars shall be "made by the Purchasing Agent after approval by the corporate authority." Literally this language means that the making of the award by the Purchasing Agent is a completed Act which does not depend upon the designated signatures for its completion. If we construe the award of a contract to mean the delivery of the contract duly executed on behalf of the city by the designated city officials, proper effect is given to the requirement of the signatures. We believe that to be the only construction which will give effect to the intention of the legislature.

8.

Your eighth question is what is meant by the words "necessary attachments" in the following provision:

"An official copy of each awarded purchase order or contract together with all necessary attachments thereto shall be retained by the Purchasing Agent in an appropriate file open to the public for such period of time after termination of contract during which action against the municipality might ensue under applicable laws of limitation. After such period such purchase orders, contracts and attachments may be destroyed by direction of the Purchasing Agent."

You say you have "interpreted necessary attachments" to include bids received, specifications (possibly by reference if standard specifications are used), requisition, receiving report and inspection reports, "and that you consider receiving and inspection reports necessary because they substantiate the purchase and because the Purchasing Agent is charged with responsibility for delivery and inspection." You inquire whether this interpretation is too broad.

We think it is. The term "necessary attachments thereto" means necessary attachments to the purchase order or contract. Exhibits attached to an order or contract and referred to in its provisions are indispensable to a full expression of its meaning and are therefore necessary attachments. The contract is a single unit consisting of all the language necessary to express the agreements which the parties to it have made. The instrument in the hands of one party to the contract must be the same as the instrument in the hands of the other. While bids, requisitions, receiving reports and inspection reports are doubtless indispensable to the completeness of the records of the Purchasing Agent, they are not necessary attachments to a contract. The necessity of their presence among the records can be satisfied without their being attached to anything. Accord-

ingly, it is our opinion that the "necessary attachments thereto" in this provision of the Act are only those items attached to an order or contract and referred to in its provisions.

CARE OF TREES ON PARKWAYS

(No. 11008—*Chairman, Finance Committee—J. F. G.—November 15, 1947.*)

The planting, care, and removal of trees in City Parkways may not be charged to the vehicle tax fund.

Citations:

Ordinance: Municipal Code, 32-5, 32-19.

Cases: 111 Ill. 532.

149 Ill. 310.

OPINION OF FOREGOING SYNOPSIS

Your letter of November 12, 1947 requests our opinion upon the following three questions:

1. May an appropriation for the employment of personnel in connection with the planting, care and removal of trees in City parkways be charged to the vehicle tax fund in the annual appropriation ordinance for the year 1948?

2. May the City remove trees on private property and charge the property owner for such service?

3. May the City charge the owners of abutting property for the removal of trees in parkways on the streets?

1. In an opinion addressed to the City Council we discussed in general the authorized uses of the vehicle tax fund and insofar as that opinion is applicable to your present inquiry we pointed out that the statute authorized the use of the vehicle tax fund to pay for improving, paving, repairing and maintaining streets and other public roadways; that the word "improve" means to do anything which would enhance the usefulness of a street for public travel; that the term "maintaining streets" is not limited to repaving and repairing them but includes the removal of anything which may be injurious to the pavements. Specifically, we said that the work of removing dead trees in the parkways, which are a source of danger to passing vehicles, will make the street more fit for public travel and, therefore, is an improvement which may be paid from the vehicle tax fund.

We believe that the planting of trees in the City parkways is not an improvement of a street for public travel and is not within the scope of the purposes for which the vehicle tax fund may be used.

It is extremely doubtful if the expense of the care of trees in the City parkways may be paid from the vehicle tax fund for the reason that such work enhances the aesthetic value of the streets and perhaps promotes the health and comfort of the people without directly affecting public travel upon the streets.

2. The City may not remove trees from private property without the consent of the property owner unless such trees are a nuisance and endanger public travel. If the City undertakes the removal of such trees it may charge the property owner for the cost thereof only by agreement. The City has other remedies however to compel the removal of decayed and dangerous trees by proceeding against the property owner for violation of the City's nuisance ordinances (sec. 32-5 - 32-19, Municipal Code of Chicago).

3. The title to the streets from lot line to lot line which include the sidewalks, parkways and roadways is in the City in trust for the use of the public. The improvement and maintenance of streets is a public obligation and may not be charged to abutting property owners except by way of special assessments or special taxes for local improvements upon property specially benefited. The removal of trees is not such a local improvement. (*City of Chicago v. O'Brien*, 111 Ill. 532; *City of Chicago v. Blair*, 149 Ill. 310.)

INSPECTING LOCOMOTIVES

(No. 11009—Chairman, Finance Committee—M. H. F.—November 17, 1947.)

The City is not authorized to inspect railroad locomotives under a smoke abatement ordinance and charge inspection fees therefor.

Citations:

Statute:	IRS '45, Ch. 24, 23-61.	
	IRS '45, Ch. 111½—(Public Utilities Act.)	
Ordinance:	Municipal Code, 99-71.	
Cases:	110 Ill. 400.	161 Ill. App. 307.
	316 Ill. 425.	175 Ill. App. 549.
	348 Ill. 193, 199.	138 Fed. 209.
	44 Ill. App. 410.	

OPINION OF FOREGOING SYNOPSIS

Your letter of November 10, 1947 requests our opinion as to whether the city has the power to inspect railroad locomotives for violations of city ordinances in regard to the emission of smoke and to charge a fee for such inspection.

By section 23-61 of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, the city has been granted express power "to define, prevent, and abate nuisances."

Exercising this source of power the City Council years ago enacted a Smoke Abatement ordinance. The ordinance declared the emission of dense smoke from the smoke-stack of any boat or locomotive, or from any chimney anywhere in the city, to be a public nuisance, and imposed a penalty upon the owner of any boat or locomotive engine, and the person or persons employed, as engineer or otherwise, in the working of the engine in the boat, or in operating the locomotive, and the proprietor, lessee and occupant of any building, who permitted or allowed dense

smoke to be emitted from the smoke-stack of any boat or locomotive, or the chimney of any building within the corporate limits of the city.

The legality of the ordinance was questioned in litigation against the owner of a steam tug-boat operated on the Chicago River and in the Chicago harbor, and the case was taken to the Appellate and then to the Supreme Court of Illinois for review. On behalf of the tug owner it was contended that the ordinance was in excess of the city's powers and also an interference with interstate commerce. The Supreme Court in the case of *Harmon v. City of Chicago* (1884), 110 Ill. 400, sustained the validity of the ordinance, held that the emission of dense smoke within a large city was a public nuisance, a nuisance *per se*, and might be abated as such. The court further held that the ordinance was in no sense in conflict with the power existing in Congress, to regulate commerce with foreign nations and among the several states.

Later the ordinance was upheld in the following cases:

Marshall Field & Co. v. City of Chicago (1892), 44 Ill. App. 410;

Glucose Refining Co. v. City of Chicago (1905), 138 Fed. 209;

City of Chicago v. Dunham Towing Co. (1911), 161 Ill. App. 307;

City of Chicago v. Dunham Towing Co. (1912), 175 Ill. App. 549.

Section 99-71 of the Municipal Code of Chicago makes it unlawful for any person owning or in charge of any locomotive to allow the emission of dense smoke except for a period of or periods aggregating six minutes in any one hour at the time when the fire-box is being cleaned out or a new fire being built therein, during which period of or periods aggregating six minutes in any one hour, the emission of smoke of a shade or density greater than Number Three of the Ringlemann Chart as published by the United States Bureau of Mines, is prohibited. Such emission of smoke is declared to be a nuisance, and may be summarily abated by the deputy smoke inspector in charge. Such abatement may be in addition to the fine imposed by the ordinance.

Other provisions of the city's Smoke Inspection ordinance provide for the filing of plans and specifications and the issuance of permits before fuel burning plants are constructed. Fees are charged for the permits. Annual inspections are made and fees are charged for original and also annual inspections. The permit and inspection provisions, however, do not apply to railroad locomotives, and so far as we know no attempt has been made to inspect the fuel burning equipment of locomotives and charge fees for such inspection. The deputy smoke inspector in charge does, however, give surveillance to all locomotives operating within the city and has been uniformly successful in prosecutions against railroads as well as owners and operators of buildings in efforts to abate the public nuisance of dense smoke.

To provide for the inspection of fuel burning equipment in railroad locomotives and the exaction of inspection fees it would be necessary that the ordinance be amended and its scope enlarged.

We doubt, however, that such an amendment would be valid and enforceable for the reason that by the passage of the state Public Utilities act, chapter 111½, Illinois Revised Statutes, the General Assembly has vested in the Illinois Commerce Commission supervision and regulation over all the service, instrumentalities, equipment and facilities of railroads. As locomotives are instrumentalities or equipment used in transportation, this vesting of authority in the Commission we believe would deprive the city of concurrent authority.

In the case of *Village of Atwood v. C. I. & W. RR. Co.* (1925), 316 Ill. 425, the Supreme Court of Illinois held that the Public Utilities Act has taken from cities power to regulate watchmen at railroad grade crossings and charged the Illinois Commerce Commission with the duty, among others, of safeguarding and promoting the safety of the public at street intersections of railroads.

In *City of Chicago v. C. G. W. RR. Co.* (1932), 348 Ill. 193, the court held that the Utilities Act took from cities the general powers conferred by the Cities and Villages Act with reference to the regulation and inspection of railroad scales for the weighing of freight. The weighing and the testing of scales used in weighing was thought to be a part of the service in the transportation of freight, which is placed under the power of the Illinois Commerce Commission, and that the power of supervision, the regulation of the weighing, the testing of the weights made and the scales used, having been committed to the Commission must be exclusive and cannot be shared with any other authority. On page 199 of its opinion the court said:

"It would be impracticable to vest in two independent authorities the power to regulate these things, and since by the later law the railroad company was required to observe the orders, rules and regulations of the commission no room was left for the exercise of concurrent authority by the city. This has been the decision in a number of cases in which the question of the power of supervision, whether by the Commerce Commission or by the officers of cities, has arisen."

A reading of the Public Utilities act and the above mentioned court decisions forces the conclusion that the city is not authorized to inspect railroad locomotives under a smoke abatement ordinance and charge inspection fees therefor.

While the city may not be authorized to inspect the fuel burning equipment of railroad locomotives and impose inspection fees, nothing herein contained should be construed as meaning that the city may not, as has been its practice over the years, institute proceedings in the courts against offending railroads and thereby abate public nuisances in the form of the emission of dense smoke from locomotives. In fact section 85 of the Utilities Act specifically provides that nothing in the act shall be construed to limit or restrict powers granted to cities to pass ordinances for the protection of the public health, safety, comfort and general welfare.

ABANDONED AIRPLANES

(No. 11011—*Commissioner of Public Works—J. F. G.—December 18, 1947.*)

The Commissioner of Public Works has the authority to order the removal of an abandoned airplane from the Municipal Airport.

Citations:

Statute: IRS '47, Ch. 24, 23-11.
Ordinance: Municipal Code, 34-2.

OPINION OF FOREGOING SYNOPSIS

By your letter of October 31, 1947 we were advised that an Army B-18 twin engine bomber has been standing on the Chicago Municipal Airport for about a year and is not in condition to be flown. The aircraft was formerly owned by a resident of Chicago who sold it to a person living in California. On May 20, 1947 registered airmail addressed to the person said to own this aircraft requesting instructions as to its disposal was sent to California and receipted for by his representative. No further word has been received regarding the disposition of this aircraft. Under the circumstances, there can be no doubt that this property has been abandoned and its presence upon the landing field at the airport is an obstruction upon municipal property and a public nuisance which may be removed by authority of section 23-11 of the "Revised Cities and Villages Act".

Section 34-2 of the Municipal Code of Chicago authorizes the Commissioner of Public Works to order any article or thing whatsoever, which may encumber or obstruct any public way, public landing, wharf or pier within the city to be removed and provides the manner and means of causing the same to be removed and sold by the Department of Public Works in the event that the article is not reclaimed. We are of the opinion that the landing field at the airport is a "public landing" within the meaning of section 34-2 of the Code and section 23-11 of the "Revised Cities and Villages Act".

You may proceed to dispose of the aircraft in the manner indicated by said section 34-2 of the Code.

CHAPTER II — RIGHTS AND DUTIES OF CITY EMPLOYEES

A. CIVIL SERVICE

WITHDRAWING RESIGNATION

(No. 10743—F. V. M.—April 1, 1943.)

The Civil Service Commission does not have authority to permit a police officer to withdraw his resignation submitted twenty-seven months previous.

Citations:

Cases: 77 Ill. 123, 136.

77 Ill. 154.

77 Ill. 533.

145 Ill. 129, 136.

194 Ill. 125.

94 Ill. App. 571.

102 Ill. App. 14, 29.

124 Ill. App. 7, 17.

Other references: Rules and Regulations of the Civil Service Commission

OPINION OF FOREGOING SYNOPSIS

Confirming your statement that Mr. Sullivan resigned from his position in the Police Department the records of the Civil Service Commission disclose that his resignation is dated January 1, 1941.

In this connection we quote from the rules and regulations of the Civil Service Commission:

"Rule 9, Sec. 2. A copy of the resignation of an officer or employee from the classified service shall be filed with the Commission by the head of the department receiving and accepting the same. The Commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing (filing) of same, provided, the head of the department concerned approval (approve) of such withdrawal and cancellation."

The court has held that rules and regulations of the Civil Service Commission are as binding as if passed by the legislature and in the case of the *City of Chicago v. Bullis*, 124 Ill. App. 7, 17, the court said:

"* * * the Civil Service Commission is powerless to disregard a valid rule, while it remains in force. *Ptacek v. The People*, 94 Ill. App. 571, affirmed in 194 Ill. 125. Rule 8 was made by the commission in pursuance of section 4 of the Civil Service Act, and is as binding as if made directly by the legislature. *Lindblom v. Doherty*, 102 Ill. App. 14, 29, citing *Mason v. Shawneetown*, 77 Ill. 533, and *Tudor v. Rapid Transit R. R. Co.*, 145 *id.*, 129, 136. * * *"

Mr. Sullivan resigned on January 1, 1941 and now approximately twenty-seven months have elapsed since the date of his resignation. He

having failed to make application for the withdrawal of his resignation within thirty days in accordance with the foregoing section of Rule 9, I am sorry to inform you that the Civil Service Commission is without legal authority to permit such a withdrawal at this time.

RESIGNATION SIGNED BY CONSERVATOR

(No. 10744—Secretary, Civil Service Commission—C. H. L.—April 20, 1943.)

A resignation of a Civil Service employee signed by a court-appointed conservator is valid where said employee has been adjudged insane.

Citations: 19 Op. Corp. Coun. 402, 441 (No. 9288).
20 Op. Corp. Coun. 48 (No. 10039).

OPINION OF FOREGOING SYNOPSIS

Your letter of March 9, 1943 to the Honorable Barnet Hodes, Corporation Counsel, relative to a Laborer, Bureau of Engineering, has been referred to me for attention, together with the following documents in the same matter: Civil Service Report F77716 showing separation of the employee from the service, letter from Mr. Thomas J. Bowler, Clerk of the Criminal Court, a letter from the Trust Company of Chicago, an order of the Probate Court and resignation of the employee by Mr. Paul C. Tychsen, Trust Officer of the Trust Company of Chicago, as Conservator of the Estate of the employee.

From the aforesaid documents it appears that the employee took a leave of absence on July 16, 1941, when he was indicted for the murder of his wife and that when on July 21, 1942, he failed to report for work after one year's leave of absence he was separated from the service.

Your records also show that on August 28, 1941, the employee was adjudged insane by a jury and sentenced to the Illinois Security Hospital at Menard, Illinois, where he is now confined.

You submit a form of resignation signed by the employee by Paul C. Tychsen, Trust Officer of the Trust Company of Chicago, a corporation, as Conservator of the Estate of the said the employee, insane, but not acknowledged before a notary public. You also submit copy of an order signed by the Probate Judge of Cook County on March 4, 1943, authorizing the Conservator of the employee's estate to file said resignation on behalf of him.

In previous opinions by this department (Op. Corp. Coun. Vol. XIX, pp. 402 and 441 No. 9288; Vol. XX, p. 48 No. 10039 and Jan. 14, 1941, No. 10403) we have held that if a conservator is empowered by order of court to sign a resignation of an employee who is mentally ill such resignation will safeguard the interests of the conservator as well as the City of Chicago. You are therefore advised that the resignation, when properly acknowledged, should be accepted and recorded by the Civil Service Commission.

SERVICE IN MERCHANT MARINE, AND AMERICAN FIELD SERVICE

(No. 10748—F. V. M.—June 14, 1943.)

Service in the Merchant Marine or American Field Service is not considered as being in the "Military or Naval Service of the United States", under the Cities Civil Service Act.

Citation: IRS '41, ch. 24½, par. 49, sec. 10½.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of June 9, 1943 in which you ask to be advised if enlistment in the United States Merchant Marine or in the American Field Service is regarded as enlistment in the Armed Forces as pertaining to civil service employees.

In answer thereto we first quote from the Illinois Revised Statutes 1941, chapter 24½:

"49. Preference to soldiers.) Sec. 10½. Persons who were engaged in the military or naval service of the United States during the years 1861, 1862, 1863, 1864, 1865, 1898, 1899, 1900, 1901, 1902, 1914, 1915, 1916, 1917, 1918 or 1919, * * * shall be preferred for appointments to civil offices. * * *

Upon inquiry we were informed by the State Headquarters, Chicago Office of the United States Selective Service that neither a member of the Merchant Marine nor of the American Field Service is considered engaged in the military or naval service of the United States.

Based upon this information we write to advise you, therefore, that the foregoing section of the Civil Service statute does not apply to members of either of these organizations.

CIVIL SERVICE LAY-OFF

(No. 10781—Chairman, Finance Committee—C. H. L.—April 27, 1944.)

In event of lay-off of Civil Service employees, Rule IX, sections 1 and 3 provide that the person who was last certified shall be laid off first.

Citations: 12 Op. Corp. Coun. 306.
16 Op. Corp. Coun. 290.
18 Op. Corp. Coun. 172.
18 Op. Corp. Coun. 200.
Civil Service Commission Rule IX, Secs. 1, 3.

OPINION OF FOREGOING SYNOPSIS

We have before us your communication dated April 17, 1944 in the above matter to which is attached Mr. Ryan's revised claim for loss of salary as senior clerk at the rate of \$206.66% per month, from February 1, 1941 to May 5, 1941, inclusive, plus interest from February 1, 1941.

Claimant Ryan contends that when he was laid off on January 31, 1941 as a senior clerk in the Board of Local Improvements, he was senior to sixty-nine other senior clerks who were then working and continued to work in different departments of the city.

His complaint states that when he was laid off as a senior clerk in the Board of Local Improvements on January 31, 1941 the senior clerk with the least seniority, no matter in what department of the city he worked, should have been laid off immediately to yield to him, and in support of his claim he cites Rule IX of the Civil Service Commission, Sections 1 and 3 which read as follows:

"Sec. 1. *Lay-Offs.* Whenever it becomes necessary, through lack of work or funds, or for other cause, to reduce the force in any employment in any department or bureau, the person who was last certified to such employment shall be first laid off. Persons laid off in accordance with the foregoing procedure shall be entitled to have their names placed on the reinstatement list according to the seniority of their certification. Any officer or employee whose position has been abolished for lack of work or funds may, upon application, have his name placed on the reinstatement list in any lower rank or grade from which he was promoted, according to his examination and seniority of certification. * * *

"Sec. 3. *Reinstatement.* When any officer or employee has returned from a leave of absence and his position in the meantime has been filled by certification, or when any officer or employee has been laid off in accordance with the preceding Section 1, or when the position of any officer or employee has been abolished, or when the name of any officer or employee has been placed on a reinstatement list in any lower rank or grade in accordance with the preceding Section 1, such officer or employee shall be eligible to reinstatement in any vacancy occurring in the same branch, class or grade according to his standing on the reinstatement list."

On July 19, 1923 this department rendered an opinion (Opinions of the Corporation Counsel, Vol. XII, page 306) in which we held:

"The rules of the Civil Service Commission require that where it is necessary to lay off a member of the classified Civil Service, either because of lack of work or funds, such lay-offs should be in the order of the relative seniority of the employee in that particular class or grade, in other words, the employee with the lowest seniority is laid off first."

On December 16, 1931 we rendered an opinion No. 7389 (Opinions of the Corporation Counsel, Vol. XVIII, page 200) in which we held:

"By virtue of previous opinions of the corporation counsel seniority entitles one in a given position in the classified service who is laid off to certification and appointment to the same position held by another of lower seniority, without regard to the department in which such other employee is engaged. If the positions held by the two employees are classified by the civil service commission at the time in the same

branch, class, grade and rank, and are of the same character of work, the senior employee may take the place of the other. The civil service is city-wide in its application and it cannot be administered by departments (Opinions of the Corporation Counsel, Vol. XVI, 1928, page 290). This opinion is decisive of the case here submitted, namely, that one laid off in one department who has seniority over another occupying a like position in another department is entitled by reason of his seniority rule, to take the place of such employee last certified to such position."

This department had occasion to render an opinion in a similar matter on August 9, 1932, Opinion No. 7704, (Opinions of Corporation Counsel, Vol. XVIII, page 172) involving the seniority of a principal clerk, in which opinion we held:

"The failure of the City Council to appropriate for the position of Principal Clerk in the Board of Local Improvements does not effect to abolish any particular principal clerkship in any department or bureau. It merely lessens the number of principal clerks that may be employed from the entire working list of such principal clerks. The effect of appropriating for fewer principal clerks in any department is to curtail the total number of such clerks that may thereafter be employed, and under the rule above quoted (Rule IX, Sec. 1) must necessitate the lay-off of those principal clerks who were last certified to that general position or employment of principal clerk. Certainly the facts of this case do not, cannot lawfully force the retirement from the service in the general service of principal clerk of one who like Mr. Clohesy has an established record of seniority in certification and service which entitles him to retention in the position of principal clerk as against many others who have been certified to the position. A principal clerk is a principal clerk no matter in what department he may be for the time employed. Seniority is not determined by service in a particular department, nor can the rule of seniority be applied to certification to service in any department. Seniority is applied in behalf of the employee from the date of original entry into the service as against all others certified to the same position without any regard to the departments in which those in that position may have been employed. Therefore when the Council abolishes a principal clerkship, no matter from which department he is thereby removed, the failure to appropriate for a principal clerkship in any department effects in law to abolish the principal clerkship of that employee who was last certified to such position. The law of seniority as established by the Civil Service act itself as well as the rule of the Commission as properly applied so operates to abolish the last principal clerk position to have been filled by certification. * * * Mr. Clohesy, therefore is entitled to the position held by the last person to have been certified as principal clerk, no matter to what department such certification may have been."

We concur in the opinions above quoted and, as seniority is the test for lay-offs, it is our opinion that claimant Ryan should not have been laid off on January 31, 1941 but instead the senior clerk with least seniority, no matter in what department he worked, should have been laid off and Ryan given his position in accordance with the provisions of Rule IX, Sec. 1, above quoted, and that, his lay-off being in violation of said rule, he was illegally laid off and as a consequence thereof, he is entitled to the amount claimed as salary for the period February 1, 1941 to May 5, 1941 during which he was deprived of his position as a senior clerk.

RESIGNATION

(No. 10786—President, Board of Health—F. V. M.—May 19, 1944.)

A resignation signed by a Civil Service Employee's Conservatrix must first be authorized by the court by which she was appointed.

No Citations.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of May 15, 1944, with reference to a former civil service employee of your department who has been confined to the Elgin State Hospital since November, 1937, at which time she took a leave of absence with disability.

You state further that the employee's sister, who was appointed her conservatrix has presented her resignation from her position as junior bacteriologist because the period of her disability credit has now expired.

The resignation is signed by the sister as conservatrix and you ask to be advised whether or not such a resignation is legal.

In order to present such a resignation, the person named must first be authorized to do so by order of the court by which she was appointed conservatrix.

REFUSING RESIGNATION

(No. 10787—Commissioner of Police—F. V. M.—June 1, 1944.)

A resignation filed by a civil service employee after charges have been filed against him should not be accepted—the filing and hearing of charges and their disposition should be proceeded with immediately.

Citations:

Cases: 224 Ill. App. 198.
10 Ind. 62.
104 Minn. 255.

Other references: 18 Op. Corp. Coun. 195.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of May 23, 1944, in which you state that at present there are charges pending against a patrolman, and that you have received a letter from the patrolman in which he asked to be permitted to resign. You ask for our opinion in the matter.

In our last letter to you with reference to the acceptance of a resignation under similar circumstances, we quoted from an opinion of this office given the City Comptroller under date of October 23, 1931, Opinion No. 7209, vol. 18, p. 195, which in part is as follows:

"Where suspension has been made with notice that charges are to be preferred, no resignation should be accepted by the head of a de-

partment; if it is considered at all, it should be as a part of the hearing on the charges preferred.

"To safeguard the city's interest against the possible repudiation of the resignation of an employee who has been suspended while charges against him are being preferred before the Civil Service Commission, the filing and hearing of charges and their disposition by the Civil Service Commission should be proceeded with immediately.

People v. Harding, 224 Ill. App. 198 (1922)."

In the foregoing case the court said:

"The relator was given the alternative of signing his resignation or having charges filed against him. The filing of such charges whether sustained or not would have subjected him to serious embarrassment, inconvenience and expense. A resignation under such circumstances cannot be said to have been given by the party resigning of his own free will. Such a resignation might have been repudiated at any time. In order to constitute a complete and operative resignation there must be an intention to relinquish a part of the term accompanied by the act of relinquishment. *Biddle v. Willard*, 10 Ind. 62; *State v. Ladeen*, 104 Minn. 255; *People v. Voorhis*, 66 Hun. (N.Y.)."

It is therefore our opinion that you should proceed with the hearing on the charges pending against the patrolman.

WELFARE ADMINISTRATION

(No. 10799—Civil Service Commission—L. L. K.—July 7, 1944.)

This opinion changed by Legislature. . . . See opinion No. 10849. Page 156.

RETURNING FROM MILITARY LEAVE

(No. 10825—Fire Commissioner—G. F. M., Jr.—November 29, 1944.)

A fireman returning to the department from military service should be examined by the Department Physician. If the physician finds the fireman unable to perform active fire duty, then the fireman still being a member of the fire department would be entitled to receive all benefits accorded firemen.

Citations:

Statute: IRS '43, ch. 24½, sec. 151.

Ordinances: Coun. order, Sept. 29, 1943.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion as to the procedure to be followed upon the return of a discharged soldier to his position in the fire department, the following is submitted:

Your letter states that the veteran became a fireman on May 22, 1936; that he was granted a leave of absence on August 8, 1942, to enter the armed forces of our country; that he was given a medical discharge from the armed forces on October 17, 1944; that he reported at the office of the Fire Commissioner on October 23, 1944, to return to service, and stated that due to an injury he had received in military service he would not be able to resume active fire duty.

The legislature of the State of Illinois, in the year 1941, passed an Act which authorized municipal corporations to preserve civil service and pension rights of their employees inducted into or enlisting in the land or naval forces of the United States, which Act was amended in the year 1943.

This Act provided in Section 2 thereof (Ill. Rev. Stats. 1943, Ch. 24½, Sec. 151):

"Any employee holding a position by virtue of any Act governing the civil service of such municipal corporation who enlists or has been or may be ordered to active Federal service, State military or naval service or inducted into the land or naval forces of the United States as provided in Section 1 of this Act may be considered as being on furlough or leave of absence during his period of training and service and for forty days after he is relieved from such training and service as provided in the Selective Training and Service Act of 1940, the Army Reserve and Retired Personnel Service Law of 1940, or other acts of Congress, and, unless incapacitated from the performance of the duties thereof, may be restored to such position without loss of seniority or to such other position as his civil service status would have entitled him had he been continuously in the active service of such municipal corporation during the period of such furlough or leave of absence."

The City Council of the City of Chicago, on September 29, 1943, adopted a resolution providing for the preservation of civil service and pension rights of employees who become members of the land or naval forces of the United States. This ordinance reads, in part, as follows:

"BE IT RESOLVED, The head of every department of the city government be and he hereby is directed not to fill, by certification from any eligible register maintained pursuant to 'An Act to regulate civil service in cities,' any vacancy caused by leave of absence of any employee for entry into the land or naval forces of the United States or in the merchant marine;"

This presumes that upon termination of his military leave the employee concerned would be returned to his civil service position.

The veteran is still in the service of the fire department, even though on leave of absence, as separation from the fire department can be only by means of death, resignation or discharge. All of the veteran's rights having been preserved to him, your department should change the veteran's record to show that he is no longer on leave of absence but has returned to the department, and that his name appears on the fire department roll.

The veteran should then be sent to the department physician for examination, so that he might determine whether or not he is capable of performing active fire duty or is incapacitated for service in the fire department. Only the opinion of the physician for the department, after an examination of the fireman concerned, determines whether or not such fireman is fit for active service; otherwise, any member of the department could allege he was unfit for active duty, and upon his own assertion claim any benefit which could accrue to a disabled fireman.

If the physician for the fire department finds the veteran unable at the present time to perform active fire duty, he being still a member of the fire department, would become entitled to receive all benefits accorded firemen.

MILITARY PREFERENCE

(No. 10836—President, Civil Service Commission—F. V. M.—February 9, 1945.)

Individuals whose names appear on a civil service list posted in 1939 and who have had military service in World War II, must retain their original positions on said list. They cannot be given preference over other eligibles whose names appear ahead of theirs on the list.

Citations:

Statute: Ch. 24½, Sec. 49 (Sec. 10½), as amended. (Smith-Hurd Annotated).

Cases: 125 Ill. 490.
264 Ill. 467.
300 Ill. 521.
302 Ill. 236.
336 Ill. 353.
371 Ill. 190, 196.
228 Ill. App. 118.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of February 1, 1945, in which you request that we render an opinion relative to a letter received from an attorney-at-law, regarding military preference. The letter from the attorney reads in part as follows:

"With reference to the presently pending Civil Service List for Ward Superintendent that is now in existence under and by virtue of your authority, I wish to call attention to the following situation:

"I am informed that this examination for Ward Superintendent was taken in the year 1939, and that thereafter in the same year, the list of successful applicants was posted. Thereafter, those having military service from many wars prior to the present one were given their proper credit and then those properly at the head of the list were certified to positions.

"It now develops that an honorably discharged veteran of the present conflict has been lifted from somewhere in the forties on the list and certified as a Ward Superintendent by reason of receiving credit for service in the present conflict.

"This action by the Commission is absolutely illegal and without benefit of any statutory or judicial support, and in fact the Illinois courts have ruled against such practices previously, and in support thereof I wish to call the Commission's attention to the case of *O'Brien v. Frazier*, 228 Ill. App. 118.

"That case was decided on the basis of the Illinois Civil Service Statute, *Smith-Hurd Illinois Annotated*, Chapter 24½, Sec. 49, as amended. The present Illinois Civil Service Statute bears the same chapter and section number and was amended May 28, 1943, and is identical to the 1919 Statute previously cited, except that on May 28, 1943, the following was inserted in the 1919 Amended Statute, after 'or 1919,'—

'or any time between September 16, 1940 and the termination of World War II, and who were honorably discharged therefrom, and all persons who were engaged in such military or naval service during any of said years, or any time between September 16, 1940 and the termination of World War II, * * *.' * * *

Notwithstanding the attorney's reference to the "Illinois Civil Service Statute," we believe he intended to comment on the City Civil Service Statute as "Section 49" (Section 10½) mentioned by him is part of that particular statute.

We first quote from the case referred to by the attorney, *O'Brien v. Frazier*, 228 Ill. App. 118, 119, 120, 121, 122, 123:

"Mr. Justice O'Connor delivered the opinion of the court.

"Thomas J. O'Brien filed his petition in the circuit court of Cook county praying for a writ of mandamus directed to the three civil service commissioners and to the chief of the fire department of the City of Chicago, commanding the commissioners forthwith to certify the name of the petitioner to the chief of the fire department as being eligible for promotion to a lieutenant in the fire department, and directing and commanding the chief of the department to promote the petitioner accordingly. * * *

"The petition alleged in substance that * * * on October 14, 1915, a promotional examination for the position of lieutenant in the fire department was held * * *; that names had been certified from said list until on December 24, 1919, petitioner was number 14 on the list; that on that date twelve of the names appearing above petitioner were certified by the commissioners to the chief of the fire department and that such persons were promoted to the positions of lieutenant in the fire department; that prior to February 24, 1920, three more persons were certified from such list upon request of the chief of the fire department and were also promoted to lieutenantcies; that the names of these three persons were lower down on the list than petitioner's, and that they were so certified by the commissioners for the reason that the commissioners awarded them extra credit under the provisions of section 10½ of the Civil Service Act as amended June 28, 1919 (Cahill's Ill. St. ch. 24, par. 695); * * *

"Section 10½ of the Civil Service Act, prior to the amendment of 1919, provided that persons who had been engaged in the military or naval service of the United States during the Civil War and who were honorably discharged should be preferred for appointments to civil service offices, provided they were found to possess the proper qualifications as shown by the examinations. This section was amended June 28, 1919 to extend the same benefits to veterans of the Spanish-American War and the World War, and the following provisions were added; * * * provided, however, that this shall not apply to promotions provided for in section 9 hereof, but in such promotions such person or persons shall be given an additional credit in the promotional examination of one per cent (1%) (on the basis of 100 per cent) for each six months or fraction thereof of such military or naval service; and, provided, further that such additional credit shall not be computed

so as to increase or decrease the rating allotted to any person competing in such examination for ascertained merits (efficiency) or seniority in service. *And provided further*, that no person shall be given such additional credits in the promotional examination for more than eighteen months of such military or naval service.'

"It is contended by the petitioner that this statute, as amended, applies only to promotional examinations held after the amendment became effective and that it has no application to persons who had theretofore passed such promotional examinations and whose names appeared on existing registers at the time of the enactment. On the other hand, respondents' position is that the amendment applies both to promotional examinations held after the passage of the amendment and to existing registers or lists of eligibles who had taken promotional examinations before the amendment, if such persons had rendered the military or naval service mentioned in section 10½.

"The intention of the lawmakers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words enlarged or restricted according to their real intent. In determining the meaning of a statute the court will always have regard to existing circumstances, contemporaneous conditions and the object sought to be attained by the statute. *Hoynes v. Danisch*, 264 Ill. 467. It is also the law that statutes will always be construed to operate *in futuro* only and a retrospective effect will not be given unless it clearly appears that such was the intention of the legislature. *Russell & Allison Drain. Dist. v. Benson*, 125 Ill. 490. What was the intention of the legislature in enacting the law in question? Did it intend that these persons who had rendered service in the army or navy and who had taken promotional examination prior to the amendment of the statute in question should be given the additional credit specified in the amendment, or did it intend that such additional credit should only apply to examinations taken after the date the amendment became effective? We think it applied to the latter only, for in that part of the amendment that applies to promotional examinations it is provided that 'in such promotions such person or persons shall be given an additional credit in the promotional examination of one per cent * * * for each six months or fraction thereof of such military or naval service; * * * *And provided further*, that no person shall be given such additional credit in the promotional examination for more than eighteen months of such military or naval service.' It will thus be seen that the statute expressly provides that the additional credit shall be given to persons entitled thereto in the promotional examinations and the legislature did not have in mind existing registers or lists of persons who had taken promotional examinations before the amendment. In the case at bar the examination took place in 1914 and the list of names was posted in 1915, four years before the amendment was enacted, and it follows, therefore, that the names on this register should have been certified in their order and not as was done, as shown by the allegations of the petition." * * *

To hold that Section 10½ as amended applies to veterans, coming within the classification thereof, whose names appear on an eligible register resulting from a civil service examination held previous to the passage of the act or the amendment thereto, would give the statute a retroactive effect. The courts of this state have repeatedly held to the contrary. In the case of *The People ex rel. Otto Kerner v. M. L. McKinley*, 371 Ill. 190, 196, the court said:

"* * * It is the often-announced rule in this State that a statute will be deemed to operate prospectively only. It will not be presumed to have retroactive operation unless the language employed is so clear

that it will admit of no other construction. *People v. David*, 336 Ill. 353; *Mather v. Parkhurst*, 302 id. 236; *Edmiston v. Donovan*, 300 id. 521." * * *

We are therefore of the opinion that those individuals whose names appear on the eligible list for Ward Superintendent, resulting from the examination taken in 1939 and who have had military service in the present war, must retain their original positions on said list and they cannot be given preference in appointment over other eligibles whose names appear ahead of theirs on said list.

WELFARE ADMINISTRATION SALARIES

(No. 10845—Commissioner, Chicago Welfare Administration—F. V. M.—May 23, 1945.)

The Cities Civil Service Act makes no provision for the fixing of salaries by the Civil Service Commission for the Chicago Welfare Administration. The Commissioner of Welfare can continue to fix the salaries of the Welfare Administration.

Citations:

Statute: IRS '43, ch. 107, secs. 17a, 36a.

Case: Circuit Court Case No. 41-C-5356.

Other references: Sec. 6, Rule 1, Rules of the Civil Service Commission.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of May 14, 1945, in which you quote as follows:

Section 17a, Chapter 107, Illinois Revised Statutes, 1943

"* * * The compensation of such overseer or officers shall be fixed by the city council or board of trustees and the compensation of such other employees and assistants shall be fixed by such overseer or officer subject to the approval of such city council or board of trustees." Section 6, Rule I, Rules of the Civil Service Commission of Chicago.

"COMPENSATION * * * Where varying compensations are established for branches and classes of the service and applied to grades or ranks original appointment to a particular office or place shall be made at the lowest fixed rate, unless the commission expressly authorizes appointment at a higher rate under circumstances noted in the minutes of its proceedings. Advancement from one compensation to another within a grade or rank shall be made according to efficiency and seniority as ascertained by the Commission. The Commission reserves to itself the exclusive right to determine the limits of compensation of grades or ranks and to decide when the maximum compensation of an office or place of employment has reached the limits of the grade or rank to which it belongs."

You state that in carrying out the mandate of the Appellate Court ordering the placement of employees of the Welfare Administration under

the provisions of the Civil Service Act, a question has arisen whether the fixing of salaries is the responsibility of the Commissioner of Welfare Administration or that of the Civil Service Commission, and that a factor in considering this question is the limitation on the cost of administering relief to ten per cent of the total moneys received and expended which is provided by state statute.

You state further that the Chicago Civil Service Commission as well as the Welfare Administration requests a clarification on this point in order that plans can be completed for the carrying out of the mandate of the Appellate Court.

Notwithstanding the fact that as a result of the decision of the court in the recent case of *People ex rel. DeBoer, et al. v. Joseph P. Geary, et al.*, No. 41-C-5356, Circuit Court, the positions of the employees of the City of Chicago Welfare Administration are to be classified and appointments thereto made in conformity with the Cities Civil Service Law, the Commissioner of the Welfare Administration will continue to fix the salaries of these employees in accordance with Section 17a of Chapter 107, Illinois Revised Statutes, 1943, above quoted.

However, by reason of the fact that the costs of administering relief is by Section 36a, Chapter 107, limited to 10 per cent of the total moneys received and expended for said relief during any years, it follows that the number of employees and the amounts of their salaries must be subject to revision from time to time in order to conform to the amount of funds available under the foregoing 10 per cent limitation. Such changes cannot be made under the present rules and regulations of the Civil Service Commission.

To enable the Welfare Commission to function in accordance with the provisions of the Pauper Act, as well as the Civil Service Statute, it will be necessary for the Civil Service Commission to adopt applicable rules and regulations to make possible the necessary changes in employees and salaries as referred to.

The writer has already respectfully suggested to you the necessity for a conference with the Civil Service Commission for this purpose.

In further answer to your inquiry we wish to advise you that the Cities Civil Service Act makes no provision for the fixing of salaries by the Civil Service Commission.

WELFARE EMPLOYEES

(No. 10849—Commissioners, Chicago Welfare Administration—F. V. M.—July 26, 1945.)

The employees of the Chicago Welfare Administration are employees of a "welfare department" as mentioned in Senate Bill No. 197 passed and signed by the Governor and amending Section II of the Civil Service Act exempting from Civil Service employees of any welfare department.

Citations:

Statute: IRS '43, ch. 107, Sec. 17a.

Ordinance: Municipal Code: Secs. 21-5, 25, 25-31.

Other references: Senate Bill No. 197, sec. 1, Sec. II.
Coun. J. 6-3-42. p. 7105.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of July 20, 1945, in which you state that word has just been received that Governor Green has signed Senate Bill No. 197 which was passed by the Sixty-fourth General Assembly on June 30, 1945, and that this bill amends Section 11 of the Civil Service Act and exempts from civil service employees of any Welfare Department; also your letter of July 25, 1945, enclosing a copy of Senate Bill No. 197 in the form in which it was passed by the Sixty-fourth General Assembly on June 30, 1945.

The decision of the Appellate Court and the decree of the Circuit Court in the matter of *DeBoer, et al. v. Gregory, et al.*, #41-C-5356, which followed established those persons employed by the Chicago Welfare Administration as employees of the City of Chicago and therefore subject to the Cities Civil Service Law.

Senate Bill No. 197 reads as follows:

"Section 1. Section 11 of 'An Act to regulate the civil service of cities', as approved March 20, 1895, as amended, is amended to read as follows:

"Section 11. Officers who are elected by the people or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any Board of Education, the superintendent and teachers of schools, *the employees of any welfare department*, heads of any principal department of the city, members of the law department, police officers above the grade of captain, and one private secretary of the mayor, shall not be included in such classified service."

Referring to the terminology of the amendment to Section 11 included in the foregoing bill, the question might be raised as to the existence of a "welfare department" in the City of Chicago as the language of the code relating to this particular activity of the city government is not the same as that used in connection with the establishment of city departments, such sections reading as follows: "There is hereby established a department" or "* * * executive department." While Section 21-5 of the Municipal Code is the following:

"There is hereby created the office of commissioner of welfare administration. He shall be appointed by the mayor by and with the advice and consent of the city council. (Amend. Coun. J. 6-3-42, p. 7105.)"

However, "Commissioner" is defined in Funk & Wagnalls Standard Universal Dictionary, New Revised Edition as "The head of an executive department of government; * * *."

Therefore, it is our opinion that the employees of the Chicago Welfare Administration are employees of a "welfare department" and by reason of the foregoing amendment to Section 11 of the Civil Service Act are excluded from the classified civil service of Chicago, and the decision of the court heretofore referred to, insofar as it refers to civil service, is nullified and it is no longer necessary for the defendants in this case to comply therewith.

Based upon the foregoing our letter of June 8, 1945, would no longer be applicable.

Section 17a of Chapter 107, Illinois Revised Statutes, 1943, among other enactments provides for the appointment of such employees and assistants of your department as may be necessary. Chapter 25 of the Municipal Code of Chicago includes general provisions for officers and both civil service and non-civil service employees. The foregoing are the only statutes or ordinances which apply to your department in matters of personnel.

Section 25-31 of the Municipal Code is part of the regulations pertaining to civil service employees adopted by the City Council and by reason of the exemption of your employees contained in the foregoing amendment to Section 11 of the Civil Service Act, Section 25-31 does not apply to the Chicago Welfare Administration.

AGE STATED ON APPLICATION

(No. 10878—President, Civil Service Commission—F. V. M.—December 14, 1945.)

The Commissioner of Police is required to appoint a man regardless of his qualifications when he has been certified by the Commission.

In case of a misstatement of age the Commissioner should call such discrepancy to the attention of the Civil Service Commission, and the applicant's certification may then be revoked.

Citations:

- Constitution: Art. IX, secs. 9, 10, 111, State Constitution of 1870.
Statute: IRS '45, ch. 24½, par. 51.
Cases: 251 Ill. 527, 529.
365 Ill. 604.

OPINION OF FOREGOING SYNOPSIS

We are replying to your communication of December 10, 1945, in which you state that you desire an opinion relative to an attached letter received from Commissioner James P. Allman in which he refers to attached copies of reports from the Director of Personnel of the Police Department referring to several candidate patrolmen.

A copy of the report of the Director of Personnel referred to indicates that on November 27, 1945 the patrolman in question was certified for appointment as a probationary patrolman and that a routine check of his military record disclosed a difference of one year in the age he gave to the military authorities and that given at the time he took the civil service examination. The date referred to are: military record, date of birth, 5/20/07, Civil Service record, date of birth, 5/22/08.

It is further stated that in view of the patrolman having made a false statement in his application to the Civil Service Commission and having been, according to his military age, 10 months beyond the admissible age at the time he took the examination for patrolman his appointment has been held up.

In this report it is recommended that this matter be taken up with the Civil Service Commission to clear up the following points:

Is the Commissioner of Police required, under civil service law and the Commission's rules, to appoint this man regardless of his qualifications when he has been certified by the Commission?

What does the Commission accept as a patrolman's official age, that given to the military authorities or the one given to the Civil Service Commission?

Does Senate Bill No. 571 approved July 24th, 1945 have any bearing on this case before appointment? Will this law prohibit his being dropped from the rolls after appointment?

We will answer these inquiries in inverse order.

Senate Bill No. 571 which amends Sections 6 and 12 of the Cities Civil Service Act cannot be applied to the case of this patrolman, and in this connection we refer you to our opinion of September 11, 1945 re a patrolman, in which we said:

"Senate Bill No. 571 goes far beyond sound principles governing preferential consideration for civil service employment. It abolishes all age limitation for such employment and thereby imposes an obligation upon municipalities to put veterans upon their payrolls as virtual pensioners without previous service to the municipalities. We seriously question the constitutionality of such legislation. Sections 9 and 10 of Article IX of the State constitution prohibit the legislature from imposing any burden upon municipalities or their inhabitants which may involve the expenditure of money raised by taxation for corporate purposes without the consent of the corporate authorities of the municipalities."

The Commission should accept as the patrolman's official age, that which he certified to in his application for appointment filed with your Commission, unless same is controverted by proper testimony or evidence to the contrary. We quote from Section 12 of the Civil Service law which reads in part as follows: (Ill. Rev. Stat. 1945, Chap. 24½, par. 51, p. 768.)

"* * * and provided further, that in the case of any such policeman or fireman who shall have filed an application for appointment in the classified civil service of such city the age stated in such application shall be conclusive evidence against such policeman or fireman of the age of such policeman or fireman but the civil service commission may hear testimony and consider all evidence available in any case in which any charge is filed against any such policeman or fireman alleging that such policeman or fireman understated his age in such application for appointment into said classified civil service of such city."

Section 12 of the Cities Civil Service Act was upheld by the Supreme Court in the case of *Malloy et al. v. City of Chicago, et al.*, 365 Ill. 604.

The Commissioner of Police, as was done in this case, should call to the attention of the Civil Service Commission the discrepancies in the age of an applicant certified for appointment, and the Civil Service Commission may revoke the certification.

In the case of *The People v. Lower*, 251 Ill. 527, the court said on page 529:

"* * * The Commission has no power to appoint to any office or position, but the power to appoint is in the head of the department or office in which a position classified under the Civil Service act is to be filled. There was no attempted revocation of an appointment since

none had been made, but when it was learned that the certificate had been improvidently made and the relator was lacking in a necessary qualification for appointment, it was within the power of the civil service commission to correct its mistake by withdrawing the certificate * * *."

RESIGNATION WHILE IN MILITARY SERVICE

(No. 10940—Commissioner of Police—L. L. K.—February 5, 1947.)

Under Statute a Civil Service employee in the military service is considered as being on leave of absence during the period of service and forty days after discharge. A resignation submitted by such employee while in military service does not become effective until forty days after his discharge.

Citations:

Statute: IRS '45, Ch. 24½, par. 151, Sec. 2.
Case: 36 Ill. App. 319.

OPINION OF FOREGOING SYNOPSIS

We have your letter of December 9, 1946 with attached copy of a letter received from one of your employees, referring to his request for a resignation from the position of patrolman. You state that you desire an opinion from us as to the date upon which his resignation should be made effective.

By virtue of paragraph 151, Section 2, Chapter 24½, Ill. Rev. Stats. 1945, a civil service employee in the military service is considered as being on furlough or leave of absence during the period of service and for forty days thereafter. Mr. Kearns states that he was discharged from the Army on October 25, 1945. He has not applied for reinstatement and has submitted his resignation dated November 11, 1946, in which he states that he confirms the verbal resignation given in January, 1946. He therein requests a refund of the amounts deducted from his salary for the Police Department Retirement Annuity Fund.

Employment in the Civil Service is terminable by (a) death, (b) resignation, (c) discharge following the filing of charges and a hearing, (d) abandonment, and (e) abolition of the position. Although we are able to find no decision by a court on the precise question here involved, it was held in *Harrison v. The People*, 36 Ill. App. 319 (1889) that to constitute abandonment of an office,

"The absence must be so long continued as to justify the legal presumption of abandonment; and the time necessary to raise such presumption must be a mixed question of law and fact to be determined from the circumstances of each case."

In the present circumstances, it is our opinion that the verbal resignation in January, 1946, supplemented by the written resignation of November 11, 1946 should properly be considered as clear evidence of the intention to abandon his position and should be considered to be effective as of forty days after October 25, 1945, the date of his discharge from military service.

"END OF WORLD WAR II"

(No. 10963—Civil Service Commission—F. V. M.—May 7, 1947.)

The term "end of World War II" as used in the Civil Service Act regarding military preference, refers to the time of the official ending of World War II by treaties of peace and not merely to the actual end of hostilities.

Citation: Sec. 10½ Civil Service Act.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of May 5, 1947 in which you call attention to an amendment to Section 10½ of the Civil Service Act, effective May 28, 1943, copy of which is attached, in accordance with which the Commission is required to give preference and credits on eligible lists to persons honorably discharged from the armed forces of World War II. Section 10½ of the Act including the amendment reads in part as follows:

"Sec. 10½. Persons who were engaged in the military or naval service of the United States during the years 1861, 1862, 1863, 1864, 1865, 1898, 1899, 1900, 1901, 1902, 1914, 1915, 1916, 1917, 1918, or 1919, or any time between September 16, 1940 and the termination of World War II, and who were honorably discharged therefrom, and all persons who were engaged in such military or naval service during any of said years, or any time between September 16, 1940 and the termination of World War II, * * *".

You asked to be advised whether or not the wording "the termination of World War II," should be interpreted as the date upon which the hostilities actually ceased, or the declaration of the end of the emergency by the President of the United States, or a future date to be set by the Congress as the official termination of World War II.

In many emergency laws passed by the Congress of the United States following the declaration of war you find the following language:

"* * * shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurring resolution or the President may designate."

indicating the possible intention to discontinue the operation of the particular law at a time earlier than the official end of the war.

In the amendment to Section 10½ of the Civil Service Act there is no time alternative to the "termination of World War II" set out in the Act and, therefore, we think the amendment must be read literally as referring to military or naval service up to the time of signing the respective treaties of peace.

It also must be taken into consideration that there are many men and women in the armed forces now occupying the former enemy countries and if this amendment to Section 10½ of the Civil Service Act was held to refer to the actual end of hostilities many of these service men and women, by reason of their more recent entry into the military and naval forces, would be denied the benefits thereof. We do not believe it was the intention of the Legislature to so limit the benefits of this Act.

It is our opinion that the said amendment to Section 10½ of the Civil Service Law should be interpreted as referring to the time of the official ending of World War II by treaties of peace.

REFUSAL TO PAY DEBT

(No. 11023—Fire Commissioner—C. H. L.—February 2, 1948.)

The head of a City department can successfully file charges against an employee before the Civil Service Commission for failure to pay a just debt if it can be shown that such person is a "dead-beat" or that he is dishonest.

Citations:

Cases: 382 Ill. 156.

314 Ill. App. 194.

Other reference: 17 Op. Corp. Coun. 624, 625.

OPINION OF FOREGOING SYNOPSIS

We have your letter of January 23, 1948 in which you outline the stand you have taken in regard to members of the fire department who fail to pay their debts and wish to say that this stand is in accordance with the law.

It is our opinion however, that your department can successfully file charges against an employee before the City Service Commission for failure to pay a just debt if it can be shown that he is a dead-beat and that he is dishonest.

On this point we quote from an opinion we wrote to Honorable L. M. Johnson, Commissioner of Streets and Electricity on November 28, 1947:

"The latest expression of our upper courts on this phase is found in the case of *Peo. ex rel. Elmore v. Allman*, 314 Ill. App. 194."

The Department of Police has a rule reading: "Section 33. Neglect to pay, within a reasonable time, a just indebtedness incurred while in the service."

We are not informed whether your department has a similar rule.

In the aforesaid *Elmore* case charges were filed against Elmore, a patrolman, for violation of said rule and he was discharged.

The Appellate Court in its decision used this language:

"All must agree that if a person owes a just debt and does not pay it because he is unable to pay it, he is not dishonest; but if he owes a just debt and refuses to pay it when he has the ability to pay it he is dishonest. The specifications in the instant case not only charged that the relator incurred indebtedness and failed to pay the same, but that the said Patrolman Charles E. Elmore *has no just or valid reason or excuse* for his failure to paid said indebtedness; that he 'has persistently refused to pay his said indebtedness.' The specifica-

tions apprised the relator that he was charged with being a deadbeat, and they charged *'that the failure of the respondent to pay these honest debts is due to dishonesty.'* The specifications also charged that the relator cashed three checks with the Belmont-Central Currency Exchange which were returned 'no account' and that he cashed a check with Freeman Bros. which was returned 'no account.' These charges as to cashing checks charged the relator with serious criminal acts. The specifications further charged him with lying to his superior officer and with deceiving the Commission. They further charged that the relator was suspended from duty six times for failure to make payments as agreed on claims filed against him, and that 'additional claims are continually being filed against him.' The specifications further charged that he filed a petition in bankruptcy and scheduled approximately \$1,500 in debts, *the major part of which was made up of rent and cash loans.* * * * We feel impelled to say that the counsel defending the relator must have been embarrassed by the number and seriousness of the charges made. No point is made that the findings of the Civil Service Commission would not warrant the discharge of the relator. It would be a serious reflection upon the administration of justice if the courts of this county compelled the City of Chicago and the Civil Service Commissioners to reinstate the relator as a member of the police department of the City of Chicago. We are impressed by the charge made by the Commissioner of Police to the Civil Service Commission that the relator 'has reflected discredit upon the honesty and integrity of all members of the Chicago Police Department, thus making it difficult and impossible for the members of the Chicago Police Department to obtain credit for the purchase of the merchandise necessary for the proper transaction of their business as police officers in the employ of the City of Chicago, and for the support and maintenance of their homes and families.' In this connection it must be noted that the pay of a police officer cannot be garnisheed, and it is therefore necessary for the police department to insist that its members act honestly in their dealings with others."

The aforesaid judgment was affirmed by our Supreme Court in *Peo. ex rel. Elmore v. Allman*, 382 Ill. 156.

The *Elmore* case is the first case of its kind successfully tried by the City of Chicago. Whether the facts in the case here under discussion warrant a similar charge must be determined first by your department and later by the Civil Service Commission.

In conclusion we quote for your consideration from our opinion No. 6387 rendered on March 26, 1929 to Honorable Richard W. Wolfe, Commissioner of Public Works (Corp. Counsel Op. Vol. XVII, page 624, 625):

"We are of the opinion that flagrant dishonesty in the matter of obtaining credit on the strength of one's civil service position and the failure and refusal to pay one's just debts certainly constitutes conduct unbecoming a civil service employee in any department of the public service, as much so as various other forms of misconduct and personal delinquency. To deliberately obtain credit and then refuse to meet the obligation incurred, on the mere ground of the immunity which one's civil service position in the public service affords him, smacks of dishonesty and to such a situation must apply the old legal maxim "*falsum in uno falsum in omnibus.*" We believe, therefore, that such obvious dishonesty would warrant the adoption by the department of a rule that wrongful failure and refusal of a civil service employee of the department to pay a just and legal obligation shall constitute conduct unbecoming an employee of the department and be cause for removal from the civil service upon written charge of a violation of such rule preferred against such employee before the

Civil Service Commission. If such rule be adopted by the department the same should be printed and promulgated as a rule which would thereafter be binding upon the employees of such department; and in any case where the head of the department deemed the facts sufficient to warrant and sustain a charge of the violation of such rule a formal charge thereof in writing can be made and filed before the Civil Service Commission for proper proceedings there."

TEMPORARY POLICEMEN AND FIREMEN

(No. 11055—President, Civil Service Commission—C. H. L.—May 11, 1948.)

In case of an emergency and only until regular appointments can be made from an eligible register, a civil service position in the police or fire department can be filled by the appointment of a temporary.

Under the terms of the Cities Civil Service Act the Civil Service Commission has the sole power of declaring the existence of such emergency.

Citations:

Statute: Section 12, City Civil Service Act.

Ordinance: Mun. Code 25-37.

Other reference: Civil Service Commission Rules, VI, VIII.

Op. Corp. Coun. No. 7238, Oct. 30, 1931.

18 Op. Corp. Coun. 171, 202.

OPINION OF FOREGOING SYNOPSIS

We have before us your communication dated April 22, 1948 in which you ask for our opinion "as to whether or not an individual who has passed the age of sixty-three years is eligible * * * for temporary appointment to a position in the Fire Department or the Police Department of the City of Chicago."

The provisions for legal retirement of policemen and firemen from the Civil Service of the City of Chicago are to be found in Section 12 of the Civil Service Act pertaining to cities, the Municipal Code of the City of Chicago and Rules VI and VIII of the Civil Service Commission's Rules:

Section 12 of the Civil Service Act provides:

"Section 12. * * * provided, that whenever the City Council of any city in which this Act is in operation, shall designate by ordinance or whenever any general law of the state shall designate any specific age of not less than sixty-three (63) years as the maximum age for legal employment of policemen or firemen in the service of any city which has adopted or shall adopt this Act or shall designate any minimum age for the automatic or compulsory retirement of policemen or firemen in the service of such city any such policeman or fireman to whom such ordinance or law may refer or apply upon attaining said designated age of sixty-three (63) years or upwards as set out in said ordinance or law shall forthwith and immediately be retired from such service of such city in accordance with the terms or provisions of such ordinance or law. It shall be the duty of the Civil Service Commission of such city to discharge or retire automatically any such policeman

or fireman in the classified service of such city at the time and in the manner provided in such ordinance or law and to certify such retirement or discharge to the proper branch or department head; * * * In addition to all the other powers now granted by law the City Council of any city which has adopted or shall adopt this Act may by ordinance provide an age limit of not less than sixty-three (63) years as the maximum age for legal employment of any person employed as a policeman or fireman under this Act, and may provide in such ordinance for the automatic or compulsory retirement and discharge of such policeman or fireman upon his attainment of the designated retirement age."

The Municipal Code of Chicago provides:

"25-37 RETIREMENT OF POLICEMEN AND FIREMEN. The age of sixty-three years shall be the maximum age for legal employment of policemen and firemen in the classified civil service of the city. Every policeman and every fireman in the classified civil service of the city who has attained the age of sixty-three years shall forthwith and immediately be retired from service."

Rule VI of the Civil Service Commission's rules provides:

"Sec. 6. AUTOMATIC AND COMPULSORY RETIREMENT OF POLICEMEN AND FIREMEN. The age of sixty-three years shall be the maximum age for legal employment of policemen and firemen in the classified civil service of the City of Chicago. Every policeman or fireman of the City of Chicago who has attained or shall hereafter attain the age of sixty-three shall be automatically forthwith and immediately retired from said service. When any such policeman or fireman has attained the age of sixty-three years the Commission shall forthwith and immediately enter an order retiring such policeman or fireman from the classified civil service. A copy of such order shall be immediately and forthwith certified to the head of the department concerned."

Rule VIII of the Civil Service Commission's rules provides:

"Sec. 3 (a). ABSENCES NOT TO DETER RETIREMENT. Every policeman or fireman in the classified civil service whether or not he is on leave of absence or on any disability roll or reinstatement register or on a lay-off in accordance with Section 1 of Rule IX who has arrived at the age of sixty-three years or upward, shall be automatically and forthwith retired."

From the above it is clear that every policeman and fireman is automatically retired from his position in the classified civil service of the city at the age of sixty-three years.

The position he held becomes vacant and must be filled by a person whose name in on an eligible list for that position. If there be no one on such eligible list it is the duty of the Civil Service Commission under the provisions of Section 3 of the Civil Service Act to create an eligible list by the proper examination.

Section 10 of the Civil Service Act provides:

"Section 10. * * * To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this Act can be made."

Rule IV of the Civil Service Commission's rules provides:

"Sec. 6. TEMPORARY APPOINTMENT. When it is necessary to make temporary appointments, appointing officers shall request and receive

written notice of approval of same from the Commission before persons are so employed. In cases of bona fide emergency, where the appointing officer can show the necessity for immediate appointment, same may be made subject to the approval of the Commission."

In case of emergency and only until regular appointments can be made from an eligible register a civil service position can be filled by the appointment of a temporary, and from the language of Section 10 it is apparent that the Civil Service Commission determines whether an emergency exists justifying such temporary appointment.

Op. Corp. Coun. No. 6915, Vol. XVIII, p. 171.

A temporary holds his position by sufferance only and the position is vacant as far as civil service eligibles are concerned.

Op. Corp. Coun. No. 6691, Vol. XVIII, p. 202.

Op. Corp. Coun. No. 7238 October 30, 1931.

We can find no law prescribing an age limit for temporary employees.

ENGINEER'S LICENSE

(No. 11068—President, Civil Service Commission—C. H. L.—July 29, 1948.)

A Civil Service examination call for Engineer Custodian may properly require that only those possessing an engineer's license prior to the examination are eligible.

Citations:

Statute: IRS '47, Ch. 111½, Sec. 104.
Ordinance: Municipal Code, 174-2 to 174-7.
Cases: 70 Ill. 388, 394.
251 Ill. 527.
121 Ill. App. 474.
329 Ill. App. 307.

OPINION OF FOREGOING SYNOPSIS

In your communication of April 28, 1948 is enclosed your Call No. 150 dated July 29, 1947 relating to an original entrance civil service examination for the position of Engineer-Custodian (Board of Education) Branch II, Class F, Grade 2 and you call our attention to the language "NOTE: Engineer's License required" which appears in such Call.

Your query is:

"Assuming that an applicant for this position who passed such examination did not have an engineers' license when he took the examination, your advice is requested as to whether or not he may be included on the eligible list reflecting the results of the examination:

- (a) without reference to his having an engineers' license; or
- (b) if he shall have obtained such a license prior to the posting of such list.

In other words, according to your interpretation of the language of the aforementioned Call No. 150, must the requirement as to his having an engineers' license be met by an applicant prior to his taking the examination in question or prior to the posting of such eligible list, or will there be a sufficient compliance with that requirement if the applicant shall have obtained an engineers' license prior to his appointment to such position."

The Municipal Code of Chicago, Chapter 174 provides:

"174-2. No steam engine or boiler subject to the provisions of this chapter shall be used, managed, or operated, except by an engineer or boiler or water tender who shall have been duly licensed and who shall have and exhibit a certificate thereof.

No individual shall take charge of, manage, or operate any steam engine, a boiler, or any portion of a steam plant, in the city without a license, as provided by this chapter * * *."

"174-4. An applicant for an engineer's license shall be a machinist or engineer, having at least two years' practice in the management, operation, or construction of steam engines and boilers * * *."

"174-6. The initial license fee for an engineer's license shall be four dollars, * * *

The renewal fee for an engineer's license shall be three dollars, * * *"

"174-7. The license for said engineer * * * shall expire one year from the date of issuance."

Section 5 of Rule II of the Civil Service Commission's rules provided:

"Sec. 5. *Special Qualifications.* In examination for positions, requiring technical, professional or scientific knowledge or experience or for positions where special qualifications are prescribed by laws or ordinances, or where certificates or licenses are required for the practice of the profession, art or trade involved, the Commission may demand satisfactory proof of such special qualifications upon the part of applicants."

Section 6 of the Cities Civil Service Law by which the Civil Service Commission is bound, provides:

"Sec. 6. *Examinations.* All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subject to examination, which shall be public, competitive and open to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character * * *."

In the opinion rendered on June 17, 1948 to Hon. Roy T. Christiansen, Commissioner of Buildings re-proposed Civil Service Examination for Plumbing Inspectors we said:

"The legislature has the power to provide how officers and employees shall be selected or appointed and their qualifications, *People ex rel. v. Wright*, 70 Ill. 388, 394, (1873). The legislature has provided by section 104, ch. 111½, that a plumbing inspector shall be a master plumber or a journeyman with the license of a journeyman plumber

in effect for at least 5 years. The legislature has full authority to require a license of one engaged in a trade or profession, *People ex. rel. v. Lower*, 251 Ill. 527 (1911).

Section 6 of the Cities Civil Service Law hereinabove quoted does not limit the right of the legislature to establish qualifications for positions. *Powell v. The People ex rel.*, 121 Ill. App. 474 (1905).

Section 5 of Rule II of the Civil Service Commission provides that the Civil Service Commission may require a license or other special qualifications upon the part of applicants at the time of the taking of an examination. The rules of the Civil Service Commission made pursuant to the authority of the Civil Service Act, have the same effect as a statute. *Cartan v. Gregory*, 329 Ill. App. 307, (1946). It therefore seems abundantly clear that the Civil Service Commission pursuant to the statute should require an applicant for examination for plumbing inspector to possess the license referred to in the statute.

To admit to examination for plumbing inspectors one who does not possess the statutory qualifications would be doing a useless act inasmuch as, even should he pass the examination he could not be certified or appointed (*People ex rel. v. Lower*, 251 Ill. 527 (1911)). We know of no authority which requires the performance of a useless act.

We have examined the call of the Civil Service Commission for examination for plumbing inspector, Branch III, Class O, Grade 3. We believe that it should include the requirement that the applicant possess the license as provided for by statute."

In accordance with the views expressed in that opinion your Call No. 150 for an examination for Engineer Custodian met with the requirements of the law, and you are advised that only those who possessed an engineer's license prior to taking the said examination were entitled to take the examination.

COAST GUARD SERVICE

(No. 11072—Secretary, Civil Service Commission—C. H. L.—August 12, 1948.)

Temporary members of the United States Coast Guard Reserve are ex-servicemen and entitled to veteran's preferences in civil service examinations.

OPINION OF FOREGOING SYNOPSIS

We have before us your communication of August 10, 1948 re certain veterans, attaching photostatic copies of their disenrollment papers as temporary members of the U. S. Coast Guard Reserve and your request for our opinion as to whether or not they are ex-service men and entitled to preference as a result of their service in the U. S. Coast Guard Reserve.

In the cases of *Harry B. Mitchell et al. v. Jack W. Cohen*, No. 9446 and *Harry B. Mitchell et al. v. Harry W. Hubickey*, No. 9447, consolidated in

the United States Court of Appeals, District of Columbia, decided in March 24, 1947 the Court held that appellees who were enrolled as temporary members of the United States Coast Guard Reserve were ex-servicemen and entitled to veterans' preferences. The court said:

"* * * We do not perceive, any critical distinction between types of limitation which could be the criterion for holding some limited service to be service, but contrawise as to other such service. The word 'servicemen' does not, in our opinion, have any inherent restriction based upon different types of limitation upon service * * *

"We hold that a person who has taken the oath as a member of a component of the armed forces, and, as such, has been on naval duty, in the regular uniform of the command, with the perquisites of rank of regular members, and has been subject to military discipline and liable to separation under dishonorable conditions, is an ex-serviceman."

It is therefore our opinion that these veterans are entitled to military preference for the periods they served with the U. S. Coast Guard.

We further believe that the language of the U. S. Court of Appeals quoted would indicate that members of the Illinois National Guard are "members of a component of the armed forces, etc." and entitled to veterans preference and that consequently the person about whom you wrote us on September 25, 1947 is entitled to veterans preference from the date of his enlistment on June 4, 1947 to July 25, 1947.

CIVIL SERVICE IN LIBRARY

(No. 11097—President, Chicago Public Library—J. F. G.—December 31, 1948.)

The position of librarian of the Chicago Public Library is not controlled by section 9-87 of the Revised Cities and Villages Act establishing a residence qualification.

Citations:

Statute: IRS '43, Ch. 24, Sec. 9-87 (Rev. Cities and Villages Act)
Ordinance: Mun. Code, Ch. 23.
Cases: 191 Ill. 516.
258 Ill. 494.
121 Ill. App. 474.
280 Ill. App. 621.

OPINION OF FOREGOING SYNOPSIS

By your letter of December 27, 1948, you requested our opinion as to whether the position of librarian of the Chicago Public Library is subject to section 9-87 of the Revised Cities and Villages Act.

Section 9-87 provides that no person shall be eligible to any municipal office unless he is a qualified elector of the municipality and has resided therein at least one year next preceding his election or appointment.

The Chicago Public Library was established pursuant to "An Act to authorize cities, incorporated towns and townships to establish and main-

tain free public libraries and reading rooms" approved and in force March 7, 1872. The title of the act has been changed somewhat by amendment approved June 30, 1921. The act as amended appears in the Illinois Revised Statutes of 1947, chap. 81, beginning at p. 2108. The library was established by action of the City Council of Chicago and is managed by a board of nine directors chosen by the Mayor with the approval of the City Council (sec. 2). By section 5 of the act it is provided:

"Said board shall have the power to appoint a suitable librarian and necessary assistants, and fix their compensation, * * *

In *Johnston v. City of Chicago*, 258 Ill. 494, our Supreme Court held the City of Chicago liable for the negligence of a driver of an automobile employed by the secretary of the library and thereby established the relationship of the library as "a part and parcel of the city government" (page 496).

The Civil Service Commission of Chicago has classified the position of librarian of the Chicago Public Library under the Cities Civil Service Act in Branch III, Class L, Grade 7 and has adopted rules relating to applications for positions in the various branches of the service, which include the following:

"No person shall be admitted to examination for any position in the classified service who has not been an actual resident of the City of Chicago for at least one year next preceding date of examination; provided, however, that in examinations for offices or places requiring technical, professional or scientific knowledge and experience or manual skill of a high order, this rule may be waived by the Commission by an order entered in its minutes."

The Commission no doubt may waive the residence requirement in the case of the librarian unless section 9-87 of the Revised Cities and Villages Act is applicable to that position. That section is a re-enactment of section 6 of article 6 of the Cities and Villages Act of 1872, and the Appellate Court of this district, in the case of *Powell v. People*, 121 Ill. App. 474, held that section related to eligibility "to offices" and not to "mere employment."

While the Library Act authorizes the appointment of a suitable librarian, such appointment is not mandatory. The word "appoint" is usually used as authority to designate a person to fill an office or position of trust (Bouvier's Law Dictionary, 3rd ed. vol. 1). A public position or place of employment is not strictly an office within the meaning of section 9-87 of the Revised Cities and Villages Act (*Powell v. People*, *supra*) although in a sense it is sometimes considered to be an office (*City of Chicago v. Luthardt*, 191 Ill. 516). A City office must be created either by statute or by ordinance passed by two-thirds vote of all the aldermen elected (Sec. 9-14 Rev. C. & V. Act; *McArdle v. City of Chicago*, 280 Ill. App. 621 and cases therein cited). The words "suitable librarian" are descriptive of the duties of the person who may be appointed or employed by the board of directors. The Library Act does not create or establish an office by the title of Librarian.

The City Council might have created such an office and under the Library Act the board of directors probably would have the power of appointment notwithstanding the provision in section 9-17 of the Revised Cities and Villages Act, which requires all appointments to offices created by the City Council to be made by the Mayor with the consent of the City Council. The City Council has never created the office of Librarian. The Municipal Code of Chicago, Chapter 23, relating to municipal libraries, establishes the Chicago Public Library and creates the offices of the board of directors of the library, but no mention is made of a librarian.

In our opinion the position of Librarian of the Chicago Public Library is not controlled by section 9-87 of the Revised Cities and Villages Act establishing residence qualification.

B. SALARIES

SICK LEAVE

(No. 10931—Commissioner, Streets and Electricity—J. H. S.—December 12, 1946.)

An employee of the City who is injured while on duty may be granted accumulated vacation sick leave and overtime credit and then apply for compensation benefits.

Citation:—Coun. J., pp. 4709-10, Jan. 9, 1946.

OPINION OF FOREGOING SYNOPSIS

In your letter of October 24, 1946, you request our opinion on the following question:

"When an employee, working under temporary authority is injured while on duty, is it within the law to grant this employee, subsequent to injury, accumulated vacation, sick-leave and overtime credit, and have him apply for disability payment after these accumulated credits have been used."

When you refer to "disability payment" we presume you mean payments under the Workmen's Compensation Act.

Pursuant to order passed by the city council on January 9, 1946, (C. J. pp. 4709-10) provision is made for vacation with pay for two weeks and for sick leave with pay for a period not exceeding fifteen days in the aggregate. As to the sick leave, the order provides that it may be "on account of sickness or other cause for absence which may be considered by the department head a sufficient and legitimate excuse for the employee's failure to be present and in attendance upon his duties * * *." In our opinion, absence from duty because of injuries received in the course of employment is cause for granting sick leave. While the employee could, if he wished, obtain benefits under the Workmen's Compensation Act, he has the option of choosing the more advantageous benefits of sick leave for a period not exceeding fifteen days.

It is our further opinion that the city council and the Workmen's Compensation law do not contemplate double benefits for the same injuries so that compensation under the Act would not be allowable for the fifteen days for which sick benefits were paid.

Accordingly, we advise you that an employee, working under temporary authority, who is injured while on duty, may be granted accumulated vacation, sick leave and overtime credit and then apply for compensation benefits.

CHAPTER III — ANNUITIES AND BENEFITS FOR CITY EMPLOYEES

A. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

CITY PENSION CONTRIBUTIONS

(No. 10827—*Municipal Employees' Annuity and Benefit Fund—*
G. F. M., Jr.—December 20, 1944.)

The Act authorizing municipalities to contribute to pension funds for members in the armed services of the United States is valid and constitutional. The Act is not objectionable on the ground of use of corporate moneys for other than corporate purposes, as pensions to employees of a municipal corporation, encourage continuous and faithful service, avoid frequent turnover in employment, and promote the morale of the employees, and in so doing indirectly benefit the city.

Citations:

Statutes:	IRS '43, ch. 24½, secs. 150, 152.
Cases:	302 U. S. 74.
	264 Ill. 612.
	265 Ill. 78.
	282 Ill. 348.
	307 Ill. 460.
	364 Ill. 348, 356.
	365 Ill. 610.

OPINION OF FOREGOING SYNOPSIS

On November 6, 1940, the City Council of the City of Chicago passed a resolution preserving the civil service rights and protecting the annuity rights of city employees inducted into the armed forces of the United States (Council Proceedings, November 6, 1940, p. 3411). On September 29, 1943, the City Council passed a second resolution superseding the resolution of November 6, 1940, enlarging the field of employees covered and making some other changes not necessary to consider here. The first resolution of the City Council was validated by, and the second resolution was based upon, an enactment of the legislature entitled, "An Act authorizing municipal corporations to preserve civil service and pension rights of their employes inducted into the land or naval forces of the United States." (Ill. Rev. Stats. 1943, Ch. 24½, Sec. 150 and 152.) Section 152 specifically authorizes the corporate authorities of any municipal corporation to make payments to any pension fund from any funds under their control.

In connection with arranging to extend the benefits of this legislative enactment to the employees of the Board of Education who are contributors to your Fund and who have been or may be inducted into the fighting forces of the United States, a question has arisen as to the constitutionality of the above mentioned legislative enactment, it being contended that tax objectors could claim that the legislative enactment authorizes the use

of corporate funds for other than corporate purposes. Corporate money would have to be used for payment into your Fund for and on behalf of persons inducted into the armed forces of the United States, of an amount equal to the deductions which would have been made from their salaries had they continued in the active service of the Board of Education.

The constitutionality of the use of corporate money for the maintenance of pension funds for employees of a municipal corporation has been sustained by the Supreme Court of this State, on the ground that pensions to employees of a municipal corporation tended to encourage continuous and faithful service, avoided frequent turnover in employment, and promoted the morale of such employees by holding out to them the promise and prospect of economic security in the event of illness, accident, or old age. (*Hughes v. Traeger*, 264 Ill. 612; *Pecoy v. City of Chicago*, 265 Ill. 78.)

The principle of law governing the use of corporate money for pension fund purposes applies with equal force to annuity and benefit funds. In the case of *Dodge v. Board of Education*, 364 Ill. 348, the Court states on page 356 of the printed volume:

"We are unable to see the distinction." (Between annuity and pension funds.) "The plan of payment is the same, the purposes are evidently the same, and the use of the term 'annuity' instead of 'pension'—which is but an annuity—does not seem to us to result in the distinction for which counsel contends."

The holding in the case of *Dodge v. Board of Education*, as to the similarity between pension funds and annuity funds, was upheld in the same entitled case by the Supreme Court of the United States (302 U. S. 74). The same holding was made in the case of *Raines v. The Board of Education*, 365 Ill. 610.

The use of corporate money for pension purposes was also sustained in the case of *Board of Trustees v. Commissioners of Lincoln Park*, (282 Ill. 348), which latter case held that a State in its governmental capacity has the power and right to direct how public funds shall be used. This principle was also sustained in the case of *Hagler v. Small*, 307 Ill. 460, in which the Court, in passing upon the constitutionality of an Act, (commonly known as the "Soldiers Bonus Bill") to provide payment of compensation to certain persons who served with the military or naval forces of the United States in the first World War, said:

"It is not contended that the obligation must be a legal one, cognizable in a court of law, but that an equitable or moral claim on the part of the individual against the State is an element necessary to the validity of this act. It may be observed that it is incongruous to say that such a public purpose may not be carried out to the benefit and welfare of the State unless it rests upon some legal or moral obligation to an individual. If the purpose be public it is so because it makes for the public weal. If such be the effect of it, the power to carry out such purpose does not rest on obligation to the individual but is found in the general welfare provisions of the constitution, and is based upon the principle that the State is empowered to do that which it ought to do for the public good."

The purpose of the legislative enactment here in question is the same in spirit and in fact as the several Acts creating pension funds maintained by corporate money. The Act in question has for its purpose the protection of the civil service rights of civil service employees entering the armed forces of the United States, and at the same time building up and maintaining their annuity rights to the same effect as if they had remained

in the service of a municipal corporation, either City or Board of Education, so that these trained employees might be induced to return to their positions in the public service at the conclusion of the War or upon their return from military service. Their civil service rights will have been preserved and their annuity rights will have been continued for them, thus holding out a possible inducement to resume and continue faithful service for the municipal corporation concerned, whether City or Board of Education, in the positions they left and in which they were trained prior to their induction into the armed forces of the United States. Moreover, the action contemplated by this legislative Act tends to sustain the morale of all employed in the service, it being obvious that the municipal corporation concerned does not abandon its employees who are fighting for their country. This is in the public interest and for the public welfare.

The Act in question is an exercise of the governmental powers of the State. It is therefore a valid law.

WIDOW'S ANNUITY

(No. 10837—Board of Election Commissioners Pension Fund—
G. F. M., Jr.—February 13, 1945.)

A widow of a civil service employee is not entitled to a widow's annuity in the Election Commissioners' Pension Fund, unless she becomes the wife of said employee before he attains the age of sixty-five.

Citation: IRS '43, ch. 46, sec. 532.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the right of the wife of a member of your pension fund to annuity, the following is submitted.

Your letter states that the member was born May 7, 1868, and was married to his present wife May 7, 1944. As he was born in 1868, he was 76 years of age at the time of his said marriage.

Section 37 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 46, Sec. 532) reads in part as follows:

"Sec. 37. The following described wives or widows of employees shall not have any right to annuity from the annuity and benefit fund he herein provided for:

(a) The wife or widow, married subsequent to the date upon which this Act shall come in force and effect in such city, of any employee who shall die while in the service, if such widow shall not have been married to such employee before he shall have attained an age of sixty-five (65) years.

(b) The wife or widow, married subsequent to the date upon which this Act shall come in force and effect in such city, of any employee who shall have resigned or been discharged from the service and who shall or shall not have entered upon annuity, and who shall die

while out of the service, if such widow shall not have been the wife of such employee while he was in the service and before he attained an age of sixty-five (65) years."

It would appear from the above that his wife would not be entitled to any annuity upon the death of her husband as she was not his wife before he attained the age of 65 years.

MERCHANT MARINE SERVICE

(No. 10944—*Municipal Employees' Annuity and Benefit Fund—G. F. M., Jr.—February 24, 1947.*)

A City employee who served in the Merchant Marine in World War II is not entitled to have the time so served, computed with his City service for pension purposes.

Citations:

Statute: IRS '45, Ch. 24½, Secs. 150-153.

Other references: Coun. J. pp. 614, 615, Sept. 29, 1943.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the pension rights of one of your members, the following is submitted:

Your letter of information indicates that the member is a window washer employed by the City of Chicago and is a member of your Fund; that during the period of World War II he served in the Merchant Marine; and that he has inquired as to whether or not he is entitled to have the period of time he served in the Merchant Marine considered for pension purposes as service for the City of Chicago.

The Act governing your Fund is an enactment by the legislature of the State of Illinois, and its terms and provisions can be modified only by the legislature.

The only authority given to your Board in connection with the annuity rights of members of your Fund engaged in the Armed Forces of the United States during World War II is conferred under the provisions of a statutory enactment entitled: "An Act authorizing municipal corporations to preserve the civil service and pension rights of their employees inducted into or enlisting in the land or naval forces of the United States, or ordered to active duty in the military or naval forces of the State." (Ill. Rev. Stats. 1945, Ch. 24½, Sec. 150-153.)

The first paragraph of the above mentioned Act reads as follows:

"Section 1. Whenever the corporate authorities of any municipal corporation, as defined in this Act, by ordinance, resolution, rule or order heretofore passed or which may hereafter be passed, shall provide for the preservation of civil service and pension rights, either or both, of employees of such municipal corporation, who, after September 16, 1940, enlist or have been or may be ordered to active Federal service or inducted into the land or naval forces of the United States

pursuant to the Selective Training and Service Act of 1940, the Army Reserve and Retired Personnel Service Law of 1940, or other Acts of Congress, or who have been ordered to active duty in the military or naval forces of the State of Illinois, it shall be the duty of all officers affected or concerned to do all things necessary to be done and to perform all acts required to carry out and effectuate the purpose and intent of such ordinance, resolution, rule or order."

It accordance with the authority thus conferred upon it, the City Council of the City of Chicago passed the requisite resolutions for preserving the civil service and pension rights of municipal employees, and the Proceedings of the City Council of September 29, 1943, contained the following resolution (pp. 614-615):

"Be It Further Resolved, That provision shall be made for payments to city pension funds of an amount equal to the deductions from the salaries of employes on leave of absence for training and service in the land or naval forces or in the merchant marine of the United States to secure to each such employe the benefit of accumulating to his credit an amount which he would accumulate by continuous service in the city and payment of his salary during his period of training and service;

"Be It Further Resolved, that this resolution shall supersede the resolution of November 6, 1940."

The main question in this case is whether or not the member came within any of the classes enumerated in Section 1 of the Act hereinabove quoted, namely, whether he was one of the "employees of such municipal corporation who after September 16, 1940, enlist or have been or may be ordered to active Federal service or inducted into the land or naval forces of the United States pursuant to the Selective Training and Service Act of 1940, the Army Reserve and Retired Personnel Service Law of 1940, or other Acts of Congress, or who have been ordered to active duty in the military or naval forces of the State of Illinois." It is evident he was not, since the Merchant Marine was not a part of the land or naval forces of the United States, but was under the supervision and control of private contractors. The members of the Merchant Marine were not sworn into the Federal service, but were under contract to their private employers.

In a similar situation an inquiry was directed to the War Shipping Administration, and in response thereto a communication was received dated August 3, 1943, signed by Ensign E. P. White, Jr., Regional Executive Officer, and stating:

"... you are informed that members of the American Merchant Marine are not classified as being in the Armed Service of the United States.

"Members of the American Merchant Marine are not entitled to the rights and privileges granted to those in the Armed Services of the United States. * * *

While it is true that the resolution of the City Council of the City of Chicago of September 29, 1943, provides for the payment into the pension fund "of an amount equal to the deductions from the salaries of employees on leave of absence for training and service . . . in the merchant marine of the United States," the statute of the State of Illinois, which is the controlling factor in the granting of this type of credit by your Fund, does not include the Merchant Marine. I am therefore of the opinion that this member is not entitled to have the period of time he served in the Merchant Marine considered for pension purposes.

ALDERMAN IN PENSION FUND

(No. 10945—*Municipal Employees' Annuity and Benefit Fund—G. F. M., Jr.—February 27, 1947.*)

No deductions can be made from a member of the Municipal Employees Annuity and Benefit Fund who has been elected as Alderman of the City of Chicago. However, by statute, the period of service of such Alderman should be placed to his credit in the Pension Fund.

Citations:

Statute: IRS '45, Ch. 24, Secs. 1085, 1174.

Cases:

287 Ill. 56.

288 Ill. 106.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning certain rights of a member of your Fund if elected to the office of Alderman of the City of Chicago, the following is respectfully submitted:

Your letter states that a civil service employee member of your Fund is running for the post of Alderman and certain of election; that you would like to be informed, (a) as to whether or not deductions for pension purposes should be made from the salary paid to such Alderman, and (b) as to whether or not the time served as Alderman will accrue to the credit of the employee for pension purposes.

Answering subdivision (a) of your inquiry, Section 42 of the Act governing your Fund (Ill. Rev. Stats. 1945, Ch. 24, Sec. 1085) provides that if anyone in the civil service is assigned to another position in the service of the City deductions shall be made from his salary in the same amount as though he were receiving the salary attached to his civil service position.

A distinction must be drawn, however, between a man elected to the position of Alderman and a person assigned to a temporary position. The Supreme Court of Illinois has held on many occasions that the usual and customary meanings must be attached to words in interpreting the statutes. (*Beutil v. Foreman*, 288 Ill. 106; *Colton v. Board of Trustees*, 287 Ill. 56.) Webster's definition of the word "assign" is: "To appoint or consign one to a post or duty"; the definition of the word "elect" is: "To select or take for an office by vote." As may be seen from these definitions, the words "assign" and "elect" cannot be construed to be synonymous.

Answering subdivision (b) of your inquiry, under the provisions of an Act entitled "An Act to provide for service credits for annuity and pension purposes in cities having a population exceeding five hundred thousand (500,000) inhabitants," (Ill. Rev. Stats. 1945, Ch. 24, Sec. 1174), the time served by such an individual as Alderman would accrue to his credit as an employee for pension purposes.

Therefore it appears that under the provisions of the law governing your Fund no deductions can be made from the salary of an Alderman for payment into your Fund for annuity purposes for such Alderman as a former civil service employee of the city and a member of your Fund. However, the period of service of such Alderman should be placed to the credit of such Alderman in computing his period of service for annuity purposes, under the provisions of the statute relating to service credits for Aldermen, hereinabove referred to.

B. FIREMEN'S ANNUITY AND BENEFIT FUND

MEMBERSHIP IN FIRE PENSION FUND

(No. 10774—*Firemen's Annuity and Benefit Fund*—G. F. M., Jr.—April 12, 1944.)

A civil service assistant telegraph repairman of the Fire Alarm and Police Telegraph Division, is not entitled to membership in the Firemen's Annuity and Benefit Fund, such Fund being restricted to those connected directly with the fire service only.

Citation: IRS '43, ch. 24, secs. 943, 944.12, 944.52.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the application of an assistant telegraph repairman, for participation in your Fund, the following is submitted:

The letter of information states that the applicant was certified by the Civil Service Commission on February 26, 1944, as an assistant telegraph repairer in the Fire Alarm and Police Telegraph Division, Department of Streets and Electricity; that he, prior to the above mentioned date, was employed by the city, in the same position, as a temporary employee from June 17, 1931, to September 21, 1931, from November 30, 1931, to April 12, 1936, and from December 2, 1941, to the date of certification; and that he has applied for membership in the Firemen's Annuity and Benefit Fund.

The only men occupying the position of assistant telegraph repairer who were at any time entitled to membership in the Firemen's Annuity and Benefit Fund were those who became so entitled by virtue of a provision in the Firemen's Pension Fund Act of 1917, which latter Act provided, in Section 13 thereof (Ill. Rev. Stats, 1943, Ch. 24, Sec. 943) as follows:

"In cities which have adopted an Act entitled, 'An Act to regulate the civil service of cities,' approved and in force March 20, 1895, all persons who have been or shall hereafter be appointed to any position which is classified by the civil service commission of such city in the fire service of such city, * * * shall be included within the meaning of the word or term 'fireman' or 'firemen' as used in this Act * * *."

The right to membership in the Firemen's Annuity and Benefit Fund was continued to these men by section 52 of the Act governing the Firemen's Annuity and Benefit Fund, which superseded the Firemen's Pension Fund Act of 1917. (Ill. Rev. Stats. 1943, Ch. 24, Sec. 944.52.)

It appears from the applicant's letter to you that he was not certified by the Civil Service Commission as assistant telegraph repairer until February 26, 1944, and therefore did not come within the provisions of the Firemen's Pension Fund Act of 1917, while that Act was in force and effect and consequently was not eligible to membership in the Firemen's Annuity and Benefit Fund of July 1, 1931, when the latter Act came in force and effect. The latter Act, in section 12 thereof, (Ill. Rev. Stats.

1943, Ch. 24, Sec. 944.12) in defining the term "fireman" as used in the Act, specifically provides that:

"* * * Any person who would have been entitled, on July 1, 1931, to membership in this fund by reason of the definition of the word 'fireman' contained in an Act entitled 'An Act to provide for a firemen's pension fund and to create a board of trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants' filed June 14, 1917, as amended, and who has not filed with the retirement board prior to July 1, 1941, a written application to be enrolled as a member of the fund created by this Act shall not be deemed to be a fireman under any of the provisions of this Act or for any of the purposes of this Act."

The applicant having been certified to his position by the Civil Service Commission in 1944, could not now be legally admitted to membership in your Fund, either by virtue of the Firemen's Pension Fund Act of 1917, or the above quoted provision of the Firemen's Annuity and Benefit Fund Act.

BENEFIT RECIPIENTS

(No. 10800—Chairman, Finance Committee—G. F. M., Jr.—July 11, 1944.)

There is no provision in the ordinance establishing the Policemen's and Firemen's Annuity and Benefit Fund providing for the payment of any money to an executor or administrator of the estate of a deceased member of the fund. Benefits are payable exclusively to the persons and for the purposes enumerated in the ordinance, i. e. to pay an allowance of money to the widow, dependent child, parent, or next of kin actually dependent upon the deceased at the time of his death.

Citations:

Statute: IRS '43, ch. 24, sec. 867, *et seq.*

Ordinance: Municipal Code, ch. 22, secs. 1 to 22.

OPINION OF FOREGOING SYNOPSIS

In response to your letter of June 26, 1944, in re a deceased captain of the Chicago Fire Department, your attention is invited to the following:

A statute of Illinois (Ill. Rev. Stats. 1943, Ch. 24, Sec. 867, *et seq.*) authorizes the City Council of any City to provide for the payment of an allowance of money to the widow, dependent child, parent, or next of kin actually dependent upon a deceased policeman or fireman at the time of his death, in case he is killed or fatally injured in the performance of his duties.

Pursuant to this authorization, the City Council of the City of Chicago passed an ordinance establishing the "Policemen's and Firemen's Death Benefit Fund" (Municipal Code of Chicago, Ch. 22, Secs. 1 to 22). This ordinance provides for the payment of certain amounts of money for the necessary support of the family or dependents of a deceased policeman

or fireman, and for the education of the children or dependent minor brothers and sisters of such deceased employee (Sec. 7 of ordinance).

There is no provision in the ordinance for the payment of any money to an executor or administrator of the estate of a deceased fireman. Benefits under this ordinance are payable exclusively to the persons and for the purposes hereinabove enumerated.

FIXING FINAL ANNUITY

(No. 10801—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—July 11, 1944.*)

A Lieutenant in the fire department on disability leave is entitled to have his final annuity based on his salary at the time of his actual separation from the fire service and not from the time of going on leave.

Citation: IRS '43, ch. 24, sec. 944.12, 944.47.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion in the matter of a fire lieutenant, the following is submitted:

Your letter of information states that the lieutenant was born on July 6, 1887; that he entered the fire service on May 29, 1917, and was granted duty disability benefits beginning October 1, 1931; that such duty disability benefits were based on his salary as a Fire Lieutenant in 1931, at the rate of \$2900.00; that he reached the age of fifty-seven July 6, 1944; and that his duty disability benefits terminated July 5, 1944. Your question is as to whether his final annuity shall be based on his salary for the year 1931, in the amount of \$2900.00, or the salary of his rank and grade for the year 1944, namely, \$3252.00.

Section 52 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 24, Sec. 944.52) provides, among other things, as follows:

"It is the intention of this section that any and all rights and benefits granted under the certain act entitled 'An Act to provide for a firemen's pension fund and to create a board of trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants,' filed June 14, 1917, in force July 1, 1917, as subsequently amended, shall be continued, preserved and secured by and under this Act to all persons to whom such rights and benefits have accrued or would or could have accrued under said latter Act, subject, however, to the limitation herein provided as to the payment of back pension."

Section 8 of the Act of 1917 (Ill. Rev. Stats. 1943, Ch. 24, Sec. 938) referred to in the above quotation, provides in part as follows:

"Any fireman of any such city, after having served twenty (20) years as a fireman, may retire from active service, and when such

retired fireman shall have reached the age of fifty (50) years the board shall order and direct that such fireman shall be paid a monthly salary attached to the rank which he may have held in the fire service at the date of his retirement * * *."

The lieutenant was a member of the fire department of the City of Chicago holding the rank and grade of Lieutenant, on leave of absence due to disability, at the time of his separation from the department on July 6, 1944. Under the sections of the laws above quoted he is entitled to have his annuity based upon the salary attached to his rank and grade at the time of his separation from the service, viz., \$3252.00.

FIXING DISABILITY BENEFIT

(No. 10802—*Firemen's Annuity and Benefit Fund*—G. F. M., Jr.—July 11, 1944.)

A fireman placed on the medical roll of the fire department for one year during which time a wage increase was granted all members of the fire department is entitled to have his disability benefits based on his salary at the time he went on the medical list—and not based on his salary when he leaves the medical list.

Citation: IRS '43, ch. 24, sec. 944.47.

OPINION OF FOREGOING SYNOPSIS

Your letter states that the applicant was born on October 19, 1910; that he entered the fire service on August 28, 1935; that he made application for ordinary disability benefits on June 23, 1944, after having been absent from duty because of illness continuously since May 28, 1943; that during the year 1943 his salary was \$2802.00 per annum; that in the year 1944 the salary of men of his rank in the department was fixed by the City Council as \$3000 per annum; that he was paid the latter rate from January 1 to June 23, 1944. Your question is as to the amount of disability benefit which should now be paid to the applicant since he is no longer on the medical roll.

Section 47 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 24, Sec. 944.47) provides, among other things, as follows:

"Ordinary disability benefit shall consist of an amount equal to fifty (50) per cent of the salary of such disabled fireman, as such salary shall be at the time such disability shall occur * * *."

As the applicant's disability occurred on May 28, 1943, at which time he was receiving a salary of \$2802.00 per annum, his ordinary disability benefit must be based on that figure. The fact that he was carried on the medical roll of the Fire Department for a period of approximately one year, during which time an increase in salary was granted to men in the Fire Department, does not mean that his disability benefit shall be based on the salary he received at the time he leaves the medical roll. His dis-

ability occurred at the time he was placed on the medical roll, as he would not have been placed on such medical roll had he not been disabled. The applicant's disability benefit should therefore be based on a salary of \$2802 per annum. The amount of any salary which may have been paid to him during his period of disability does not in any manner affect the provisions of the Act governing your Fund, concerning payment to him of disability benefits.

REFUNDING PENSION DEDUCTIONS

(No. 10804—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—July 21, 1944.*)

The Firemen's Annuity and Benefit Fund should not refund a fireman's pension deductions until the fireman's resignation becomes final.

Citation: Rules Civil Service Commission.

OPINION OF FOREGOING SYNOPSIS

Your letter states that the applicant was born July 8, 1901; that he entered the fire department on February 21, 1930; that he submitted his resignation, to be effective June 3, 1944; and that he has applied for a refund of his salary deductions. Your question is as to when his resignation is considered to be final.

The rules of the Civil Service Commission of the City of Chicago permit the withdrawal of the resignation of a civil service employee at any time within thirty days following the date on which the resignation is to become effective. To pay such an employee a refund of his salary deductions before the expiration of this 30-day period would be to violate the provisions of the Act governing your Fund, under which provisions such refund can be paid only upon separation from the service. It therefore follows that a resignation from the fire department cannot be considered to be final (and thereby constitute separation from the service) until thirty days after the effective date of such resignation.

DISABILITY BENEFITS

(No. 10812—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—September 15, 1944.*)

Any disability which occurs to a fireman after he has returned to the service and worked for a considerable time is a new disability, whether such disability occurred within six months or six years after his first disability. The disability benefits to be paid in such case

must be based on the salary he was receiving from the fire department at the time the present disability occurred, and not on the basis of any salary he was receiving when some former disability occurred.

Citation: IRS '43, ch. 24, sec. 944.12, 944.17.

OPINION OF FOREGOING SYNOPSIS

Your letter states that the applicant was born on June 28, 1897; that he entered the fire service on May 2, 1923; that he became a Lieutenant on April 1, 1930; that on December 19, 1942, he was granted ordinary disability; that on February 1, 1944, the disability benefits of the applicant were discontinued and he returned to active duty; that he is again disabled, due to a recurrence of the condition causing his original disability, and he has made application for ordinary disability benefits. Your question is as to whether or not the benefits payable to the applicant should be based on the salary he received in 1942 at the time he became originally disabled, or upon the salary of 1944, when, because of recurrence of the condition causing his original disability, he again became disabled.

Section 47 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 24, Sec. 944.47), provides in part as follows:

"Ordinary disability benefit shall consist of an amount equal to fifty (50) per cent of the salary of such disabled fireman, as such salary shall be at the time such disability shall occur * * *."

"Disability" is defined in Section 12 of your Act (Ill. Rev. Stats. 1943, Ch. 24, Sec. 944.12) as:

"A condition of physical or mental incapacity on the part of a fireman to perform any duty or duties in the fire service of such city which such fireman can be and shall be assigned to perform."

While it may be that his present disability is due to a recurrence of some physical condition which led to his original disability, it cannot be said that his present disability is a continuation of his original disability, since he recovered from his original disability and returned to work. Any disability which occurs to a fireman after he has returned to the service and worked for a considerable period is a new disability, whether such new disability occurred within six months or six years after his first disability.

In accordance with the provision of Section 47 above quoted, it follows that the disability benefits to be paid to the applicant must be based on the salary he was receiving from the fire department at the time his present disability occurred, and not on the basis of any salary he was receiving when some former disability occurred.

AGE ON APPLICATION

(No. 10817—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—October 11, 1944.*)

The age stated in a fireman's civil service application shall be conclusive evidence of his age and the Retirement Board of the Firemen's Annuity and Benefit Fund has no authority to change or correct it.

Citation: IRS '43, ch. 24, sec. 944.60.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the date to be used in computing the age of a fireman, the following is submitted:

It appears that the subject was a member of the fire department of the City of Chicago; that he died on May 15, 1932, as the result of the performance of an act of duty; that his date of birth, as stated in his Civil Service record, was September 16, 1887; that the widow of the deceased has written to your Board to the effect that she has proof that her husband was born on September 16, 1888; and that she has requested that your records be changed to show that the birth of her husband was September 16, 1888.

Section 60 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 24, Sec. 944.60) provides as follows:

"In the case of any fireman who shall have filed an application for appointment as a member of the fire department of such city, the age stated in such application shall be conclusive evidence of the age of such fireman for the purposes of this Act."

The above quoted provision of the Act governing your Fund does not grant to your Board the specific power to make any change in your records in a case of this character, but must be construed as meaning that the age stated in the application is conclusive as against the fireman and his beneficiaries.

I am of the opinion that in this case the age to be used in making your computations is the age stated in the deceased's application.

USE OF WORD "WIDOW"

(No. 10818—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—October 11, 1944.*)

The word "widow" as used in section 44 of the act governing the Firemen's Annuity and Benefit Fund in connection with increased allowances, refers to the mother of said child or children and not merely to the widow of such deceased fireman.

Citations:

Statutes: IRS '43, ch. 24, secs. 940 (b), 944.43, 944.44.

Cases: 287 Ill. 56, 61.

379 Ill. 155, 161.

OPINION OF FOREGOING SYNOPSIS

In construing Section 44 of the Act governing your Fund, so far as the same relates to annuities payable to the children of firemen who have died in performance of an act of duty, it becomes necessary to follow the rules of construction laid down by the Supreme Court of this State.

Sections 43 and 44 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 24, Secs. 944.43, 944.44) read as follows:

"Sec. 43. Annuity to be known as 'Child's Annuity' shall be provided for unmarried children who shall be the issue of firemen. Any such annuity shall be payable monthly, from and after the date of the death of the fireman parent of any such child, until the annuitant shall attain an age of eighteen (18) years.

"Sec. 44. Child's annuity as hereinafter provided, shall be granted and paid for the benefit of any unmarried child, less than eighteen (18) years of age, the issue of any following described fireman who shall die on or after the date upon which this Act shall come in force and effect in such city; provided, such child shall have been born or been in esse before such fireman shall have resigned or been discharged from the service:

"Any fireman whose death shall result from the performance of any act or acts of duty; any fireman who shall die while in the service from any cause; any fireman who shall resign or be discharged from the service subsequent to his attainment of an age of fifty (50) years and who shall have entered upon annuity or who shall be eligible for annuity; any fireman who shall have served twenty (20) or more years and who shall have resigned or been discharged from the service who shall die before he shall have entered upon annuity, provided such fireman shall not have received nor applied for refund of the amount to which he shall have a right of refund in accordance with the provisions of section 39 of this Act.

"Any such annuity shall consist of amounts of ten dollars (\$10.00) per month for each child while a widow of the deceased fireman parent of such child shall survive and of twenty-five dollars (\$25.00) per month for each such child while no such widow shall exist; provided, if annuities for the widow and children of any fireman who shall die on or after the date upon which this Act shall come in force and effect in such city, and whose death shall have been the result of performance of any act or acts of duty performed on or after said date, or for the children of such fireman in any such case wherein a widow shall not exist, computed at the rates hereinbefore stated, would exceed an amount equal to the final salary of not more than three thousand dollars (\$3,000.00), of such fireman, the annuity for each child of such fireman shall be reduced pro rata so that the combined annuities for the family of such fireman shall not exceed such amount; and in the case of the family of any fireman who shall die on or after said date and whose death shall have been the result of any cause or causes other than injury incurred in the performance of any act or acts of duty in which annuities for such family, computed at the rates hereinbefore stated, would exceed an amount equal to sixty (60) per cent of the final salary of not more than three thousand dollars (\$3,000.00), of such fireman, annuity of each child of such fireman shall be reduced pro rata so that the combined annuities for such family shall not exceed said last stated amount.

"Any annuity which shall be granted for the benefit of any child, shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child.

"The retirement board shall estimate the amount which will be required to pay annuities to children during each year, and such amount shall be paid annually by the city into the annuity and benefit fund herein provided for from taxes levied and collected for the purposes of said fund."

The above provisions are a continuation of the provision made for the benefit of the children of firemen, and originally appearing in the Firemen's Pension Fund Act of 1917 (Ill. Rev. Stats. 1943, Ch. 24, Sec. 940 (b)) which fund was superseded by the present fund and which Act was superseded by the present Act. The original provision for children in the Act of 1917 specifically provided that ten dollars (\$10.00) per month should be paid to each child while its mother lived and fifteen dollars (\$15.00) per month if its mother were dead. The reason for this increase lay in the fact that children who are full orphans are left practically upon their own resources. There is no legal obligation on the part of a stepmother to provide for and educate stepchildren. Such stepmother may consider such children strangers in the household and may put them out at any time. In order to provide that the children of a deceased fireman should be cared for in the event their mother were also dead, the legislature wisely provided an increase in the amount of the pension payable to such child for its care, clothing, maintenance and education. That was the clear purpose of the law which provided for such increase in pension.

In *Scott v. Freeport Motor Casualty Co.*, (379 Ill. 155, 161) the Supreme Court of Illinois laid down the following principle of law in connection with construing a statute:

"The primary object in construing a statute is to ascertain the legislative intent expressed therein. In seeking the legislative intent, courts should consider the language used, the object to be attained, or the evil to be remedied, and this may involve more than the literal meaning of the words used. When the words used, followed literally, lead to an absurd consequence or to a construction clearly not contemplated, this constitutes a sufficient reason to depart from the language used for the purpose of ascertaining the intent. A thing which is within the intention of a statute is within the statute, although not within its letter, and a thing within the letter is not within the statute unless it is within the intention. Statutes must be so construed as to be given a reasonable construction, if possible."

In the case of *Colton v. Trustees* (287 Ill. 56, 61) the Supreme Court of Illinois held that pension statutes should be liberally construed in favor of those intended to be benefited. In the instant case, the one intended to be benefited is the child of a fireman whose mother is dead and whose father comes within one of the classes designated in Section 44 of the Act. Consequently, the "widow" referred to in Section 44 of the Act, reading "Any such annuity shall consist of ten dollars (\$10.00) per month for each child while a widow of the deceased fireman parent of such child shall survive and twenty-five dollars (\$25.00) per month for each such child while no such widow shall exist," should be construed to mean the widowed parent of such child responsible for its support and maintenance.

This construction is supported by the provision in the same section to the effect that "Any annuity which shall be granted for the benefit of any child, shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed

by a court of law as the guardian of such child." In other words, the only "parent" to which the child's annuity could be paid is necessarily the mother.

This relating of the word "widow" to the word "parent", meaning the mother of the child, is in conformity with the evident intention of the legislature and with the manifest purpose of such grant of increased annuity. This construction, giving to the full orphan child of a fireman an increased annuity for its care, protection and education has been the evident purpose of the legislature since the enactment of the Firemen's Pension Fund Act of 1917. Any other construction would not carry out the evident purpose of the legislature nor enable the orphan children of a fireman to receive the benefits of increased annuity needed for their proper care.

While contemporaneous construction of a statute is not necessarily binding on the courts, the fact that the above construction of this statute has been uniformly followed by your Board since the creation of your Fund in 1931, carries with it the weight of the interpretation placed by the Trustees of your Fund upon the intention and purpose of this award to orphan children.

I am of the opinion that the word "widow" used in section 44, in connection with an increased allowance to the orphan children of deceased firemen refers to the mother of said child or children, and not merely the widow of such deceased firemen.

TRANSFERRING PENSIONS

(No. 10875—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—*
December 13, 1945.)

Contributions paid into the pension fund by a fireman may be transferred to the police pension fund when such fireman resigns from the fire department to become a member of the police department.

Citations: ch. 24, sec. 985.
Statutes: IRS '45, ch. 24½, secs. 150, *et. seq.*
Other reference: Coun. J. 1940, p. 3411.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion as to whether or not certain moneys may be transferred directly to the Policemen's Annuity and Benefit Fund, the following is submitted:

Your letter states that the applicant was born June 30, 1909; that he entered the Chicago Fire Department on August 27, 1935; that he was granted a military leave of absence and entered the military service of the United States on October 28, 1942; that he was discharged from the armed service and returned to the Chicago Fire Department on October 23, 1944; that he resigned from the Chicago Fire Department to enter the Chicago Police Department on August 27, 1945. Your question is as to whether or not certain contributions for annuity purposes can be trans-

ferred to the Policemen's Annuity and Benefit Fund of Chicago. These contributions were paid by the fire department into your Fund for the benefit of the member pursuant to the provisions of the Illinois Statutes (Ill. Rev. Stats. 1945, Ch. 24½, Sec. 150, et seq.) and pursuant to a certain resolution of the City Council (City Council Proceedings November 6, 1940, page 3411).

Section 41 of the Policemen's Annuity and Benefit Fund Act (Ill. Rev. Stats. 1945, Ch. 24, Sec. 985) provides in part as follows:

"Any service rendered by any policeman while not in the police department of such city, as a regular member of the paid fire department of such city shall be counted, for annuity and benefit purposes under the provisions of this Act, as if such service were rendered as a policeman of such City. * * * No credit for periods of service rendered by any such policeman while a member of the fire department shall be allowed to him, for any of the purposes of this Act, after July 1, 1931, excepting for such period of service for which he shall have contributed in accordance with the provisions of the Act relating to the firemen's annuity and benefit fund and paid into the annuity and benefit fund herein provided for."

During the period of time that the member was on military leave from the fire department, certain moneys were paid by the fire department to stand to the credit of the member in the Firemen's Annuity and Benefit Fund, in accordance with the provisions of the statute and the Council resolution hereinabove cited. The moneys so paid into your Fund are public moneys, and there is no provision in the Act governing your Fund for the payment of tax money or corporate money to a contributor to your Fund, other than in the form of an annuity, when such moneys have been paid into your Fund solely to preserve the pension rights of the individual concerned.

In order that the pension rights of the individual may be fully preserved, it becomes necessary that the accumulation standing to his credit, which was paid under the provisions of the statute and the Council resolution, be transferred by your Board directly to the Policemen's Annuity and Benefit Fund.

By the transfer of these contributions made by the City for the military service of the member, the spirit and intent of the statute and City Council resolution will be maintained and the pension rights of the member will not have suffered by reason of his transfer to the police department.

In the event the member should resign from the police department and seek a refund of salary deductions, the moneys transferred at this time to the Policemen's Annuity and Benefit Fund to pay for the period of military service of the member should be returned by the Policemen's Annuity and Benefit Fund to the City of Chicago.

It is suggested that a copy of this opinion accompany the transfer of the moneys to the Policemen's Annuity and Benefit Fund, so that they may be fully informed as to the proper application of the funds so transmitted.

PENSION DEDUCTIONS

(No. 10876—*Firemen's Annuity and Benefit Fund—G. F. M., Jr.—December 13, 1945.*)

When money is paid to trustees of a pension fund for a specific purpose, a fiduciary relationship is created. When money so paid cannot be applied for such specific purposes it becomes the legal and equitable duty of the trustees to return the amount so paid.

Citations: 379 Ill. 155.

Statutes: IRS '45, ch. 24½, sec. 150 *et seq.*

Other references: Coun. J. 1940, p. 3411.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the disposition of certain moneys paid into your Fund by the fire department of the City of Chicago to preserve certain pension rights for one of its members, the following is submitted:

Your letter states that the member was born on May 29, 1908; that he entered the Chicago Fire Department on October 1, 1935; that he entered the military service of the United States on March 10, 1942; that he was killed on March 25, 1943, while on active military duty, leaving no widow or minor children; that on June 25, 1943, your Board ordered that his salary deductions, plus accrued interest from October 1, 1935, to March 10, 1942, be paid to his heirs, as is provided by the Act governing your Fund; that from March 10, 1942, to March 25, 1943, the sum of \$116.98 was contributed by the City to the Fund for the deceased, covering his period of military service. This money was paid by the City pursuant to the provisions of the Illinois statute (Ill. Rev. Stats. 1945, Ch. 24½, Sec. 150 *et seq.*) and pursuant to a certain resolution of the City Council (Council Proceedings 1940, page 3411). Your letter further states that the sum of \$116.98 has been retained by the Fund, and your question is as to what disposition should be made of this amount.

In an approved opinion rendered to another pension fund on March 16, 1943, it was held that deductions paid into a pension fund under the requirement of the City Council resolution hereinabove referred to were not refundable to the employee concerned. One of the purposes of the above entitled Act of the legislature was and is to "preserve the pension rights" of men inducted into the service, and the intention of the resolution adopted by the City Council was to further the same purpose by providing for payments into the pension funds of an amount equal to the deductions for annuity purposes which otherwise would have been made from the salaries of the employees concerned.

In the case of *Scott v. Freeport Motor Casualty Company*, 379 Ill. 155, 161, the Supreme Court of this State held that statutes must be so construed as to give a reasonable construction, if possible, and that the intention of the lawmakers in passing a statute is to be found and given effect, if not in violation of the Constitution.

It is the clear intent of both the legislative enactment and the resolution of the City Council to place the employee concerned in a position where the amount of his annuity would not be lessened or decreased by reason of his induction into the land or naval forces of the United States.

While it is true that the statute provides (Ill. Rev. Stats. 1945, Ch. 24½, Sec. 152) that "the pension trustees shall treat such payments in the same manner and with the same effect as if such payments were deductions from the salary of such employee," this can only be construed to mean, as provided in the title of said Act: "To preserve * * * pension rights of * * * employees inducted into the land or naval forces of the United States." This purpose cannot be enlarged upon. The employee for whom these moneys were paid into your Fund by the fire department of the City of Chicago having died, and consequently being unable to receive the benefits of such payments into your Fund, and the necessity for preservation of his pension rights having ceased, the proper course is to return to the corporate fund, from which these payments were made into your Fund, the exact amount so paid into your Fund.

The reason for so returning these moneys is that the purpose for which these payments were required to be made into your Fund by resolution of the City Council cannot be accomplished, inasmuch as the employee for whom they were made has passed away.

When money is paid to trustees of a pension fund for a specific purpose, a fiduciary relationship is created, and when the money so paid cannot be applied for such specific purpose by the said trustees, as in the instant case, it becomes the legal and equitable duty of the trustees to return to the payer the amount so paid. It therefore follows that the \$116.98 now held in your Fund should be returned by your Fund to the City of Chicago, which had paid the \$116.98 to you for a purpose which cannot now be carried out.

PENSION RE-EMPLOYMENT

(No. 10985—President, Civil Service Commission—C. H. L.—August 8, 1947.)

A person on the fireman's reinstatement list is not re-employed in the service, within the meaning of section 34 of the Pension Fund Act and he is therefore entitled to continue receiving his service pension.

Citation:

Statute: IRS 45, Ch. 24, Sec. 944.34.

Case: 292 Ill. App. 390.

OPINION OF FOREGOING SYNOPSIS

We have before us your letter dated July 15, 1947 requesting our opinion as to the legality of members of the Fire Department receiving a service pension, under the provisions of the Firemen's Annuity and Benefit Fund at the same time as having their names placed on a reinstatement list.

According to the facts stated in your letter these members of the Fire Department had resigned from the department and were subsequently granted authority to withdraw their resignations according to the rules of the commission and their names are now on a reinstatement list.

Sec. 944.34 of the Firemen's Annuity and Benefit Fund Act. (Ill. Rev. Stats. 1945, Ch. 24, Sec. 944.34, page 619) provides:

"944.34. Re-entry into service 34(a). When any fireman who shall resign or be discharged from the service after the date upon which this act shall come in force and effect in such city, shall re-enter the service before he shall have attained an age of fifty-seven (57) years, any annuity previously granted to such fireman and any annuity fixed for the wife of such firemen shall be cancelled."

In the case of *Kelly v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 292 Ill. App. 390, the Court, in discussing the above mentioned Section 34, said:

"The provision in this statute relating to the suspension of pensions appears to us to be clear and unambiguous, and it therefore requires no construction. It provides that when an applicant becomes a pensioner and re-enters the fire service the board has power to suspend payment of his pension during the time he was re-employed 'in the service,' and this clearly refers only to service in the fire department."

It is our opinion that a person on the fireman's reinstatement list is not re-employed in the service within the meaning of section 34 above referred to and that he is therefore entitled to his service pension.

DISABILITY PENSION

(No. 11046—*Firemen's Annuity and Benefit Fund*—G. F. M., Jr.—April 13, 1948.)

Under the provisions of the Firemen's Pension Fund Act of 1917, any fireman who is being paid a disability pension has the right to continue to be paid such pension until his recovery from such disability or until his death if he fails to recover.

Citations:

Statute: IRS '47, Ch. 24, Secs. 939, 944.52.

Case: 281 Ill. 636, 641.

OPINION OF FOREGOING SYNOPSIS

Your letter of April 6, 1948, states that at the last meeting of your Board a Corporation Counsel opinion was requested "as to whether or not a pensioner receiving disability pension should continue to receive such disability pension after his attainment of age 63 and consequent separation from Civil Service status by operation of the State law."

A disability pensioner is a fireman receiving a disability pension under the Firemen's Pension Fund Act of 1917. The right to such pension is preserved to firemen by Section 52 of your Act.

Section 52 of the Firemen's Annuity and Benefit Fund Act (Ill. Rev. Stats., 1947, Ch. 24, Sec. 944.52) provides in the last sentence of said section as follows:

"It is the intention of this section that any and all rights and benefits granted under the certain act entitled 'An Act to provide for

a firemen's pension fund and to create a board of trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants,' filed June 14, 1917, in force July 1, 1917, as subsequently amended, shall be continued, preserved and secured by and under this Act to all persons to whom such rights or benefits have accrued or would or could have accrued under said latter Act, subject, however, to the limitation herein provided as to the payment of back pension."

Section 9 of the Firemen's Pension Fund Act of 1917 (Ill. Rev. Stats. 1947, Ch. 24, Sec. 939), so far as said section concerns the question here involved, reads as follows:

"If any firemen of any such city while in active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service, said board shall order the retirement of such disabled fireman and he shall be paid a monthly pension equal to one-half the amount of salary attached to the rank which he may have held in such fire service at the date of his retirement: Provided, further, that the pensions so paid shall not exceed the sum of three thousand (\$3,000.00) dollars per annum, nor be in any case less than six hundred (\$600.00) dollars per annum. Provided, however, that no pension shall be allowed to any fireman who has been so physically or mentally disabled while on leave of absence without pay for more than thirty days during any year.

"If, after placing a fireman on the pension roll, the board shall become satisfied that such retired fireman has recovered from such physical or mental disability, said board shall order the suspension of the payment of his pension and that said fireman report back to the marshal or chief of the fire department of such city, who shall thereupon order the reinstatement of such fireman in active service in the same rank or grade that such fireman held at the time of his retirement."

The rights of a fireman receiving a disability pension are governed exclusively by the provisions of the Firemen's Pension Fund Act of 1917. No provision of, and no amendment to, the civil service Act can affect any of the provisions of the Firemen's Pension Fund Act of 1917, since the pension fund Act and the civil service Act are two separate and distinct pieces of legislation. (*Stiles v. Board*, 281 Ill. 636, 641.)

The Firemen's Pension Fund Act of 1917 contains only one provision concerning the termination or suspension of payment of a disability pension, and that is found in the second paragraph of Section 9, hereinabove quoted; namely, action taken by the Board upon the recovery of such fireman from his disability.

In the absence of a finding such as the Act of 1917 requires, there is no authority for the suspension or the termination of the payment of a disability pension at any age.

I am of the opinion that under the provisions of the Firemen's Pension Fund Act of 1917, any fireman who is being paid a disability pension has the right to continue to be paid such pension until his recovery from such disability or until his death, if he fails to so recover.

LEAVE OF ABSENCE

(No. 11064—*Firemen's Annuity and Pension Fund*—G. F. M., Jr.—July 11, 1948.)

An Assistant Telegraph Repairman for the City of Chicago who died while on a leave of absence still retains full pension privileges.

No Reference.

OPINION OF FOREGOING SYNOPSIS

Your letter states and your records disclose that the deceased was born September 13, 1907; that he entered the service of the City as an Assistant Telegraph Repairman on June 10, 1924; and that he died May 10, 1948.

Your letter further states that on June 13, 1944, he took a leave of absence from his regular position, and at the time of his death was working as a Lineman for the City of Chicago (Payroll No. 3635). Your question is as to whether or not he was properly a participant in your Fund at the time of his death.

There is no provision in the Firemen's Annuity and Benefit Fund Act which provides that a leave of absence shall terminate participation in the Fund created by the Act. Whenever a fireman takes a leave of absence to engage in work outside the fire department, he forfeits during the period of such leave of absence his right to credit for service in the fire department, his right to contribute toward his annuity accumulation, and his right to claim disability benefits for any disability occurring subsequent to the granting of such leave of absence. Such leave of absence, however, does not deprive him of any rights or benefits he may have previously earned under any of the provisions of your Act, and to the latter extent he remains a participant in your Fund.

I am of the opinion that the deceased was properly a participant in your Fund at the time of his death.

FIREMAN ON PENSION

(No. 11089—*Firemen's Annuity and Benefit Fund*—G. F. M., Jr.—December 7, 1948.)

A former City fireman receiving a pension from the Firemen's Annuity and Benefit Fund may be employed by the Municipal Tuberculosis Sanitarium and receive a salary for the performance of said duties.

Citations: 292 Ill. App. 390.

OPINION OF FOREGOING SYNOPSIS

Your letter states and your records disclose that the annuitant was born October 19, 1894; that he entered the fire service on November 16, 1923;

that he resigned, effective January 31, 1945; that he has been receiving an annuity in the amount of \$125.00 per month since February 1, 1945; that your Board has been notified that he is employed at the present time by the Municipal Tuberculosis Sanitarium of Chicago; and that your Board would like an opinion as to whether or not he is legally entitled to receive age and service annuity from your Fund while he is gainfully employed by the Municipal Tuberculosis Sanitarium.

Under the holding of the Appellate Court of the State of Illinois in the case of *Kelly v. Retirement Board of the Firemen's Annuity and Benefit Fund of the City of Chicago*, 292 Ill. App. 390, the annuitant is entitled to receive the annuity of \$125.00 per month, even though he is employed in another branch of the service of the City of Chicago.

In the aforementioned case the Appellate Court held:

"The provision in this statute relating to the suspension of pensions appears to us to be clear and unambiguous, and it therefore requires no construction. It provides that when an applicant becomes a pensioner and re-enters the fire service the board has power to suspend payment of his pension during the time he was re-employed 'in the service,' and this clearly refers only to service in the fire department."

Having met all the requirements of the Act governing your Fund, and not having re-entered the service in which he earned his annuity, he is entitled to continue receiving the age and service annuity heretofore granted to him.

C. POLICEMEN'S ANNUITY AND BENEFIT FUND

DISABILITY BENEFIT TO MEMBERS OF ARMED FORCES

(No. 10733—*Policemen's Annuity and Benefit Fund—G. F. M., Jr.—January 14, 1943.*)

Induction into the Armed Services of a pension recipient should put the Retirement Board on inquiry as to the physical condition of the recipient, and result in the adjustment of said individual's disability benefits in conformance with the results of the investigation.

Citation: IRS '41, ch. 24, sec. 989, 990.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the payment of duty disability benefit to a policeman after he has been inducted into the armed forces of the United States, the following is submitted:

Section 45 of the Act governing your Fund (Ill. Rev. Stat. 1941, Ch. 24, Sec. 989) provides for the payment of disability benefit to any policeman less than fifty-seven (57) years of age who shall become disabled

subsequent to January 1, 1922, as a result of injury incurred on or after said date in the performance of any act or acts of duty; that such disability benefit shall be an amount equal to seventy-five (75) per cent of his salary as it shall be at the time of such injury; provided, that if his disability shall have in any measure resulted from any physical defect or mental disorder or any disease which existed at the time such injury was sustained, or his disability is less than fifty (50) per cent of total disability for service of a remunerative character, such policeman shall have a right to receive duty disability equal to fifty (50) per cent of the amount of his salary as it shall be at the time of such injury. Said section further provides for the payment of what is known as child's disability benefit in the amount of ten dollars (\$10.00) a month on account of each unmarried child (the issue of such policeman) less than eighteen (18) years of age, with the provision that the total amount of child's disability benefit which shall be granted to any such policeman shall not exceed twenty-five (25) per cent of the salary of such policeman.

The same section provides for a medical examination of a disabled policeman at least once a year in connection with his alleged disability. The said section also provides as follows:

"When the disability of any such policeman shall cease, said Board shall discontinue payment of duty disability benefit and child's disability benefit to such policeman and such policeman shall be returned to active service as a policeman."

"Disability" is defined in the Act governing your Fund as "a condition of physical or mental incapacity on the part of a policeman to perform any duty or duties in the police service of such city which such policeman can be and shall be assigned to perform."

When a policeman who is in receipt of duty disability benefit is accepted by the United States government and inducted into the armed forces, such acceptance and induction is sufficient evidence of physical fitness to place your Board upon inquiry as to whether or not such policeman is able to perform "any duty or duties in the police service" which such policeman "can be and shall be assigned to perform".

Disability benefit payment checks should be withheld forthwith and an immediate investigation made as to the nature of the work being performed by such policeman in the armed forces, and information solicited from the Commissioner of Police as to whether or not there is any duty or duties in the police department to which such policeman can be and shall be assigned to perform if he is sufficiently recovered from his original disability to justify his return to the police service.

If your inquiry or investigation discloses that such policeman is able to perform duty in the police service, and that he would be assigned to such duty if returned to the police department, it then becomes your duty, after a hearing, to remove him from the disability roll.

If the facts disclosed by your investigation satisfy your Board that such policeman is not able to perform any duty or duties in the police service which such policeman can be and will be assigned to perform, it then becomes your duty to ascertain whether or not his disability is less than fifty per cent of total disability for any service of a remunerative character, in which latter event his disability benefit must be reduced to fifty per cent of his salary, as such salary was at the time of his injury (Ill. Rev. Stats. 1941, Ch. 24, Sec. 989-b).

Section 6(g) of the Act governing your Fund provides, among other things, as follows:

"No such annuity, pension or benefit shall be reduced or suspended until the annuitant, pensioner, or beneficiary concerned shall first be

notified of the proposed action and be given an opportunity to be heard concerning such proposed action."

A likely inquiry should be made into the disability claimed by a police man who is in receipt of "ordinary disability" benefit and who is accepted for and inducted into the armed forces of the United States. While the disability benefit of the latter is fixed by statute at fifty per cent of salary (Ill. Rev. Stats. 1941, Ch. 24, Sec. 990), his employment in the government armed forces is sufficient evidence of recovery from disability to warrant investigation of his right to be paid further disability benefit.

REFUND OF PENSION DEDUCTIONS

(No. 10739—*Policemen's Annuity and Benefit Fund—G. F. M., Jr.—*
March 16, 1943.)

Payments made by the City for the purpose of preserving and maintaining the annuity rights of members of the pension fund serving in the armed service, cannot lawfully be paid to such members as a refund.

Citations:

Statutes: IRS '41, ch. 24½, sec. 150.
Council orders: Coun. J. p. 3411, Nov. 6, 1940.
Cases: 379 Ill. 155, 161.

OPINION OF FOREGOING SYNOPSIS

The following is submitted in reply to your request for an opinion as to whether salary deduction payments credited to policemen on leave of absence because of military service are refundable to the policeman, when such payments have been made by the City of Chicago pursuant to the provisions of an Act entitled, "An Act authorizing municipal corporations to preserve civil service and pension rights of their employees inducted into the land or naval forces of the United States", approved March 26, 1941, (Ill. Rev. Stats. 1941, Ch. 24½, Sec. 150), and pursuant to a certain resolution of the City Council of the City of Chicago adopted November 6, 1940, (Council Proceedings of November 6, 1940, p. 3411).

One of the purposes of the above entitled Act of the legislature was and is to "preserve the pension rights" of men inducted into the service, and the intention of the resolution adopted by the City Council was to further the same purpose by providing for payments into the pension funds of an amount equal to the deductions for annuity purposes which would have been made from the salaries of the employees concerned.

In the recent case of *Scott v. Freeport Motor Casualty Company* (379 Ill. 155, 161) the Supreme Court of this State held that statutes must be so construed as to be given a reasonable construction if possible, and that the intention of the lawmakers in passing a statute is to be found and given effect, if not in violation of the Constitution.

It is the clear intent of both the legislative enactment and the resolution of the City Council that the sole purpose was and is to place the

employee concerned in a position where the amount of his annuity would not be lessened or decreased by reason of his induction into the land or naval forces of the United States.

Your inquiry is as to whether the amounts of money paid by the City into your pension fund, in lieu of salary deductions, for the upbuilding of the annuity accumulation of a policeman, were to be "refunded" to such policeman upon his retirement from the service. The moneys so paid into your Fund are moneys derived from taxes, and there is no provision in your law for the payment of tax money to a policeman, other than in the form of annuity. The moneys so paid are in lieu of deductions from his salary during his absence in military service, and as he receives no salary from the City during that period, those moneys so paid into your Fund were not moneys of the policeman, nor were they deductions from his salary.

The title of the legislative enactment referred to indicates that the sole purpose of the provisions of the Act is to preserve civil service and pension rights of employees inducted into the land or naval forces of the United States. This purpose cannot be enlarged upon. It is also very clear that the payments made by the City pursuant to the legislative enactment can be used only for the purpose of "protecting" the pension or annuity rights of the employee concerned.

The meaning of the word "refund", as used in your Act, is "to give back", and as the policeman concerned never paid these City contributions, there is nothing to "give back" to him out of such contributions.

There is no provision in the Act governing your Fund that permits the Retirement Board to pay out City contributions or tax moneys to any policeman member of the Fund, excepting in the form of annuity.

I am of the opinion that payments made by the City for the purpose of preserving and maintaining the annuity rights of members of your Fund inducted into the land or naval forces of the United States cannot lawfully be paid to such members as a "refund", but can be used only in the payment of annuity to such policeman.

INCREASING WIDOW'S ANNUITY

(No. 10809—*Policemen's Annuity and Benefit Fund*—G. F. M., Jr.—August 16, 1944.)

The accumulation for widow's annuity purposes is limited to deductions from the salary of the policeman concerned. Any voluntary contributions made by a policeman for the purpose of increasing his own annuity cannot be used to increase his widow's annuity.

Citation: IRS '43, ch. 24, sec. 974.

OPINION OF FOREGOING SYNOPSIS

In response to your request for advice concerning a patrolman, now deceased, but formerly a member of the Chicago Police Department, the following is submitted:

Your letter of information states that the deceased was born January 19, 1898; that he was appointed to the Police Department on February 20, 1922; that he died from natural causes May 10, 1944; that he is survived by his widow, whom he married on August 1, 1933, and by two sons who are adults and now serving in the Armed Forces; that he made extra voluntary contributions, in accordance with the terms of Section 16, paragraph (d) of the Act governing your Fund; that at the time of his death these contributions amounted to \$853.62. Your question is as to whether or not these contributions made by him should be added to the accumulation to be used for widow's annuity purposes.

Paragraph (c) of Section 74 of the Act governing your Fund (Ill. Rev. Stats. 1943, Ch. 24, Sec. 974) provides in part as follows:

"(c) The widow of any future entrant who shall die while in the service before he shall have attained an age of fifty-seven (57) years shall have a right to receive annuity, from and after the date of the death of such future entrant, of such amount as can be provided from the total amount of the sums accumulated to the credit of such future entrant on the date of his death for age and service annuity and widow's annuity purposes from deductions from his salary and from contributions by the city: * * *."

Inasmuch as accumulation for widow's annuity purposes is limited to deductions from the salary of the policeman concerned, any voluntary contributions made by such policeman for the purpose of increasing his own annuity cannot be used to increased his widow's annuity. Such voluntary contributions made by the policeman should be paid to the administrator or executor of the estate, if any, or to the persons entitled thereto under the law of Illinois governing intestate estates.

TRANSFERRING PENSION DEDUCTIONS

(No. 10816—*Policemen's Annuity and Benefit Fund—G. F. M., Jr.—Oct. 10, 1944.*)

A former stenographer in the police department who later resigns and becomes a patrolman is entitled to pay into the Police Pension Fund the same amount of money refunded to him from the Municipal Employees' Annuity and Benefit Fund.

Citation: IRS '43, ch. 24, sec. 985-a.

OPINION OF FOREGOING SYNOPSIS

The applicant became a member of the police department of the City of Chicago on July 11, 1933. Prior to that time he had been employed as a stenographer in the police department for a number of years. He has now applied for credit for service for that period of time during which he served as an employee of the City of Chicago prior to his becoming a member of the police department.

The records of the Civil Service Commission show that the applicant became a stenographer in the police department on March 23, 1914, and continued in such capacity until he became a patrolman.

The records of the Municipal Employees' Annuity and Benefit Fund of Chicago show that he was a contributor to the Municipal Employees' Pension Fund, and later to the Municipal Employees' Annuity and Benefit Fund, during the time of his employment as a stenographer in the police department, up to July 11, 1922, when he became a member of the police department.

The records of the Municipal Employees' Annuity and Benefit Fund show that in the year 1929 he was paid a refund of the deductions made from his salary as Junior Stenographer, hereinbefore referred to, said refund being in the amount of \$274.40.

From the above records it is clear that he was in the service of the City of Chicago for a little over seven years prior to his induction as a member of the police department.

Section 41½ of the Act governing your Fund (Ill. Rev. Stats. 1943, Cr. 24, Sec. 985a) provides as follows:

"Any contributor to and participant in this fund (other than a member of the fire department of such city) who has served or shall hereafter have served as a member of the police department of such city for a period of ten or more years and who, prior to becoming such member was in the employ of such city and was a contributor to and participant in any pension fund or in any other annuity and benefit fund existing in such city by operation of law shall have the right to pay into the annuity and benefit fund herein provided for an amount to the sum which would have accumulated to the credit of such policeman in this fund from deductions from his salary for annuity purposes on the date when such payment shall have been made into this fund if such policeman had been paying into the annuity and benefit fund herein provided for such sums as he actually paid into such pension fund or into such other annuity and benefit fund. Concurrently with the payment into this fund of the sum or sums equivalent to the deductions made from the salary of such employee and paid into such pension fund or other annuity and benefit fund subsequent to January 1 of the first year after the year in which this Act shall come in force and effect in such city such city shall contribute such amounts as are provided according to the terms of the Act governing such other annuity and benefit fund. No credit shall be allowed for any period of time for which salary deductions or contributions by the policeman concerned have not been paid into this fund. The period of service rendered by such policeman prior to the date on which such policeman became a member of the police department of such city and for which such policeman has contributed or paid into this fund shall be credited to such policeman as a period of service for all the purposes of this Act excepting that such policeman shall not have any of the rights conferred by the provisions of section 55 or 55½ of this Act."

The applicant, having served more than ten years as a policeman in the police department, is entitled to the benefits of the section above quoted. He should be permitted to pay into your fund an amount equal to the sums paid by him (or deducted from his salary) for annuity purposes and credited to him in the Municipal Employees' Pension Fund and Municipal Employees' Annuity and Benefit Fund at the time of his entry into the police service. This amount, as hereinabove stated, was \$274.40.

The intention of this provision of the Act is to bring about a practical transfer of pension credits enabling a policeman to receive pension credits for the entire period of his service to the city. It has to do solely with the building up of his annuity accumulation and does not confer upon him any rights of retirement on any basis other than that of becoming entitled

to such annuity as his annuity accumulations as a "future entrant" will pay him. In other words, he does not change his status to that of "present employee", nor does he become entitled to retire on half pay after twenty years of service and attainment of age fifty years. He remains a "future entrant" with only the rights of a "future entrant".

It will be noted that the section above quoted provides that concurrent city contributions shall be paid only in connection with salary deductions made subsequent to January 1, 1922. Payments made by him to the Municipal Employees' Pension Fund are not to be improved with concurrent city contributions, since the Municipal Employees' Annuity and Benefit Fund came into existence on July 1, 1921, and superseded the Municipal Employees' Pension Fund on January 1, 1922, so that contributions made by him prior to January 1, 1922, did not carry concurrent city contributions. Such concurrent city contributions can therefore not be credited to him on deductions from salary for any period prior to January 1, 1922.

POLICE PENSION FUND

(No. 10855—*Policemen's Annuity and Benefit Fund*—G. F. M., Jr.—
Aug. 20, 1945.)

A policeman illegally discharged is not, as a matter of law, deprived of his civil service rights to continued membership in the police department. His subsequent reinstatement does not constitute a re-entry into the service, but is a continuation of service. Such officer would be entitled to pay into the fund the money paid to him as a refund, and also to pay all deductions that would have been made from his salary during his absence, plus 5% interest per annum.

NO CITATIONS.

OPINION OF FOREGOING SYNOPSIS

Your letter states that the applicant joined the police department December 21, 1921; that he was discharged on March 2, 1925; that a refund was made to him on June 8, 1925; that he was restored to the department by order of court on January 28, 1931; that he did not repay the refund; and that your office is in receipt of a letter dated June 22, 1945, from him stating that he is now in a position to repay the refund and requesting that such repayment be allowed to be made.

Inquiry into the records of the Civil Service Commission showed that in an order entered by Judge Martin Isaacs on January 28, 1931, case No. 507003, in the Superior Court of Cook County, the Court found: "The Civil Service Commissioners were without jurisdiction to order the discharge of the petitioner from his position in the Chicago Police Department * * *; that petitioner has waived all right to action for back salary in consideration of his reinstatement."

The Court ordered that the "record be quashed and for naught esteemed." The quashing of the record places the parties in the same

legal position as though no charges had ever been filed against him. The applicant having been illegally separated from the department, was not, as a matter of law, deprived of his civil service right to continued membership in the police department, and his reinstatement on January 28, 1931, did not constitute a re-entry into the service, but was a continuation of his service.

The applicant would be entitled to repay to your Fund the money paid to him as a refund, and also to pay all the deductions that would have been made from his salary had he been receiving the same during the period of his illegal separation from the department. These sums should be improved with interest at 4% per annum to arrive at the proper amount now payable by him.

WIDOW'S ANNUITY

(No. 10883—*Policemen's Annuity and Benefit Fund—G. F. M., Jr.—*
Jan. 9, 1946.)

A woman who married a now deceased police lieutenant in violation of her previous divorce decree prohibiting remarriage within one year is legally the wife of such policeman and is now entitled to receive a widow's annuity from the Police Pension Fund.

Citation: IRS '45, ch. 40, sec. 1a, repealed by ch. 40, sec. 2.

OPINION OF FOREGOING SYNOPSIS

In response to your letter requesting an opinion as to whether or not the wife of a deceased policeman is entitled to a widow's annuity from your Fund by reason of the death of her husband, the following is submitted:

Your letter states, and a check of the records disclose that the policeman (retired) died July 15, 1945; that on August 24, 1945, the applicant filed an application for annuity as his widow; that she was married to him on September 4, 1907, at Crown Point, Indiana; that prior to her marriage to the policeman she had been married to one Louis Honic on February 4, 1899, at Racine, Wisconsin; that a certified copy of a decree of divorce, issued by the Superior Court of Cook County, being Case No. 260913, has been furnished to your office by her; that the certified copy indicates that Axel Chytraus, Judge of the Superior Court of Cook County, granted a divorce to her from Louis Honic on September 4, 1907; that the decree, after setting up the divorce and the right of Alice Honic to resume her maiden name, provides: "It is further ordered, adjudged and decreed that neither party shall marry again within one year from the date of this decree."

The sentence quoted above was made a part of the divorce decree in order to comply with an amendment passed in the year 1905 to the Divorce Act of 1874 (Ill. Rev. Stats. 1945, Ch. 40). The amendment, known as Section 1a of the above cited Act, provided as follows:

"That in every case in which a divorce has been granted for any of the several causes contained in section one of said act, neither party shall marry again within one year from the time the decree

was granted: * * * and every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years, and said marriage shall be held absolutely void."

In the year 1923, however, the legislature of the State of Illinois repealed Section 1a and amended the Divorce Act by providing in Section 2 of the Act (Ill. Rev. Stats. 1945, Ch. 40, Sec. 2):

"In all cases where a marriage has been contracted in violation of the provisions of section 1a of 'An Act to revise the law in relation to divorce,' approved March 10, 1874, as amended, except where either of the contracting parties has, subsequent to said marriage, and prior to the taking effect of this Act, entered into another marriage which was and is legal and binding, under the laws of Illinois, said marriages so contracted in violation of Section 1a, if otherwise legal, are hereby validated and confirmed, except that property rights heretofore vested shall not be affected by this Act."

The above quoted Section of the Act in relation to divorce therefore validated and confirmed the marriage between the policeman and the applicant, and she became the legal wife of the policeman by reason of the enactment of said law.

Being the legal widow, she is entitled to receive widow's annuity from your Fund.

WAIVING PENSION DEDUCTIONS

(No. 10928—City Comptroller—G. F. M., Jr.—Nov. 18, 1946.)

Deductions made from the salary of a policeman and paid into a pension fund are not the property of the policeman but are public moneys transferred from one public fund to another, and may not be waived by such policeman.

Citation:

Case: 265 Ill. 78, 80.

OPINION OF FOREGOING SYNOPSIS

The attention of your office is respectfully called to the matter of deductions for pension purposes to be made from the salaries of Police Captains Eugene A. Barry, John T. Carten, Walter F. Healy, Louis Klatzco, Thomas E. Connelly, Thomas Harrison, and Lieutenant William J. Drury. These deductions from salary are required by statute to be made by your office and paid to the City Treasurer as treasurer ex officio of the Policemen's Annuity and Benefit Fund of Chicago.

In accordance with computations made by the actuary and accountant of the above mentioned Fund, the total amount to be paid into the said Fund by the City is \$3,242.60, which amount is made up of the following items:

Amounts to be deducted from salaries to be paid for the period from June 16, 1945, to September 16, 1946.

Captain Eugene A. Barry	\$217.66
Captain John T. Carten	217.66
Captain Walter F. Healy	263.62
Captain Louis Klatzco	263.62
Captain Thomas E. Connelly	293.59
Captain Thomas Harrison	293.59
Lieutenant William J. Drury	245.97

Total\$1795.71

Amounts to be paid by the City in lieu of deductions from the salaries waived for the period from June 16, 1944, to June 15, 1945, and to be credited according to statute to the following:

Captain Eugene A. Barry	\$174.67
Captain John T. Carten	174.67
Captain Walter F. Healy	212.68
Captain Louis Klatzco	212.68
Captain Thomas E. Connelly	236.82
Captain Thomas Harrison	236.82
Lieutenant William J. Drury	198.55

Total\$1446.89

This latter payment by the City is required to be made because, while the policemen concerned have the power and the right to waive the salaries payable to them, they have no power or right to waive the deductions which would otherwise have been made from those salaries and paid by the City into the said Fund.

The Supreme Court of this State has held that deductions made from the salaries of policemen and paid into a pension fund are not the property of the policemen, but are public moneys transferred from one public fund to another public fund. (*Pecoy v. City*, 265 Ill. 78, 80). As these deductions are public moneys, they cannot be waived by an individual.

ADOPTED CHILDREN

(No. 10996—*Policemen's Annuity and Benefit Fund—G. F. M., Jr.—Sept. 12, 1947.*)

The adopted child of a deceased policeman is not entitled to receive a child's annuity from the Policemen's Annuity and Benefit Fund.

Citation: IRS '45, Ch. 24, Secs. 987, 988.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the right of an adopted child of a policeman to receive child's annuity, the following is submitted:

Section 43 of the Act governing your Fund (Ill. Rev. Stats. 1945, Ch. 24, Sec. 987) provides for the payment of "Child's Annuity" for unmarried children of policemen.

Section 44 of the Act governing your Fund (Ill. Rev. Stats. 1945, Ch. 24, Sec. 988) provides in part thereof as follows:

"Child's annuity, as herein provided, shall be granted and paid for the benefit of any unmarried child less than eighteen (18) years of age the issue of any following described policeman . . ."

The use of the word "issue" in the above quoted section prohibits the payment of child's annuity to any adopted child. It is not possible, therefore, in any way to provide for payment of child's annuity to adopted children of policemen, until such time as the provisions of the Act governing your Fund are changed by legislative enactment.

PENSION DEDUCTIONS FOR TEMPORARY POLICEMEN

(No. 11002—*Retirement Board, Policemen's Annuity and Benefit Fund*
—G. F. M., Jr.—Oct. 20, 1947.)

Any person appointed and sworn as a member of the Police Department by an emergency appointment, should be entitled on later becoming a civil service member of the Police Department to pay into the Pension Fund the amount of the deductions that would have been taken out for the period served as a temporary had such officer been a Civil Service policeman.

Citations: IRS '45, Ch. 24, Sec. 956.
Ch. 24½, Secs. 39 et seq., 48, 59½.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the rights of certain temporary policemen, the following is submitted:

Your letter states that there are a number of men, now members of the regular police department of the City of Chicago, who served as temporary policemen for various periods of time prior to their certification by the Civil Service Commission. Your inquiry is as to whether or not the policemen described above are entitled to receive credit for annuity purposes for the period of time during which they worked as temporary policemen. You further inquire as to what provisions should be made regarding the deductions that would have been taken from their salaries, had they been civil service policemen of the City of Chicago, in the event such credit is to be allowed to them.

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1945, Ch. 24, Sec. 956) defines a policeman as:

"'Policeman': Any person appointed and sworn or designated by law as a policeman of such city, and who has served, or is serving, or shall serve in the regularly constituted police department of such city as a policeman, . . . and member of the police force of such police department."

If these men, who served as temporary policemen after their appointment as such policemen, signed the same oath which is signed by civil service appointees in the police department, each such temporary appointee signing such oath became a policeman, as defined in your Act, since he was a "person appointed and sworn . . . as a policeman" of the City of Chicago. Being a policeman within the definition of your Act, he became entitled to all the rights and benefits of your Fund.

The mere fact that the men referred to were not members of the police department by virtue of competitive civil service examination and appointment, does not deprive them of any rights in your Fund, because these is nothing in your Act which requires that members of your Fund, contributors to your Fund, shall be civil service appointees.

The Act to regulate the civil service of cities (Ill. Rev. Stats. 1945, Ch. 24½, Sec. 39 et seq.) requires that all employees of any city adopting the Act (excepting certain departments and department heads) shall be subject to the provisions of the civil service Act, as to examination, certification, promotion, etc.

Section 10 of the Act to regulate the civil service of cities (Ill. Rev. Stats. 1945, Ch. 24½, Sec. 48) provides for the appointment of temporary employees in cases of emergency, or to promote the proper conduct of the business of the city. While this applies to the police department, as well as other departments, it does not, however, alter the provisions of the Act governing your Fund, which gives the benefits of your Fund to any person appointed and sworn as a policeman, as well as to anyone who may be "designated by law" as a policeman.

Section 59½ of the Act governing your Fund provides that no annuity shall be paid "based upon any salary paid to such policeman by virtue of a temporary appointment." This provision was inserted in the Act as an amendment in order to avoid the necessity of paying annuities based exclusively on the salary of a temporary position, such as a patrolman assigned temporarily to the position of a sergeant, or sergeant appointed temporarily as lieutenant or acting captain, and receiving the salary of the temporary position for a year or so, and then resigning, under Section 55, to take a pension based on such higher salary.

It was not the intention of Section 59½ to deny annuity to a policeman appointed and sworn and serving in the police department, subject to the same hazards and dangers and being paid the same salary as a civil service brother officer in the same departmental rank or grade. Naturally, it cannot be assumed that a person would be appointed as a temporary policeman every sixty days, as provided in Section 10 of an Act to regulate the civil service of cities, and be permitted to continue to serve as such temporary appointee for ten or more years, because such appointment was made only because of an emergency and would reasonably expire when such emergency had ceased to exist.

It is only natural to expect that when a civil service examination was called by the Civil Service Commission, during or subsequent to the existence of such emergency, the policeman who has served as temporary appointee would seek to become a civil service appointee, since his emergency appointment would necessarily terminate.

In view of the above, I am of the opinion that any person appointed and sworn as a member of the police department of the City of Chicago, whether such appointment be by virtue of competitive civil service examination, or an emergency temporary appointment, should have deducted from his compensation the amounts set out in your Act to be deducted from the salaries of policemen. If a policeman working under temporary appointment should later become a civil service appointee, he would be legally entitled to credit for his entire service as a policeman, starting with the date he was appointed and sworn.

As such policeman is entitled to receive credit for his term of service as a temporary policeman, and as no deductions were made and paid into your Fund from his salary during his period of temporary service, it is necessary that such salary deductions be paid by the policeman to whom credit is to be given, before such credit can be allowed to him. These salary deductions, which were not taken from the salary of such policeman, should be paid into your Fund, together with interest at the rate of four per cent on each such deduction, from the time such deduction should have been made until such deduction is paid.

POLICE CUSTODIAN

(No. 11056—Commissioner of Police—G. F. M., Jr.—May 12, 1948.)

Money accumulated by the Police Custodian is properly payable to the Policemen's Annuity and Benefit Fund of Chicago.

Citations:

Statute: IRS '47, Ch. 24, Sec. 950.
Ch. 37, Sec. 417.
Ch. 50, Sec. 27, et seq.
Ordinance: Municipal Code, 11-19.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning certain moneys in the possession of the Custodian of the Police Department, the following is submitted:

Your letter states that the Custodian of the Police Department has in his possession between \$6,000.00 and \$7,000.00 in U. S. Currency which was taken from envelopes and gambling cases where the money was ordered confiscated by various judges of the Municipal Court; and that the Custodian wishes to turn the money over to the Policemen's Annuity and Benefit Fund.

Under the Municipal Code of the City of Chicago, the Custodian of the Police Department is required to pay over to the Policemen's Annuity and Benefit Fund the proceeds of any sale or sales of property seized by the police, which property has not been claimed by the rightful owner thereof. Municipal Code of Chicago, Sec. 11-19.

While the aforementioned currency does not have to be "advertised and sold" in order that the moneys therefrom might be turned over to the Policemen's Annuity and Benefit Fund in accordance with Section 11-19 of the Municipal Code, it still retains its identity as seized property.

The Statutes of the State of Illinois (Ill. Rev. Stats. 1947, Ch. 50, Sec. 27, et seq.) provide for the disposition of lost goods and lost money which have been found by any person or persons. The moneys involved in this matter, however, differ from the class of moneys required by the aforementioned Chapter 50, Section 27, et seq., to be delivered to the County Treasurer, as these funds are not moneys that were lost and then found, but are moneys which have been seized by the police and which a court of record has ordered to be paid to the Custodian of the Police Department. This payment to the Custodian of the Police Department is authorized by the Act governing the Municipal Court of Chicago, in Sec-

tion 57 thereof (Ill. Rev. Stats. 1947, Ch. 37, Sec. 417) a portion of which provides as follows:

"All moneys collected upon judgments of the municipal court in the criminal and quasi-criminal cases provided for in this section shall be paid to the clerk, who, at the end of every three months, shall pay to the City of Chicago so much thereof as shall consist of costs, excepting witness fees, and the balance, if any, excepting witness fees, to the officer entitled to receive the same. . . ."

The Custodian of the Police Department having been directed to be paid these seized moneys by the Court, is the officer entitled to receive such moneys, and according to the City ordinance above referred to must pay such moneys to the Policemen's Annuity and Benefit Fund.

The Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago, being the Board of Trustees of that Fund, has the power to "accept by gift, grant, bequest or otherwise any money or property of any kind and use the same for the purposes of the annuity and benefit fund" provided for in the statutory enactment creating said fund. Ill. Rev. Stats. 1947, Ch. 24, Sec. 950.

This authority to accept a gift of money or property of any kind includes the power to accept the U. S. Currency accumulated by the Custodian of the Police Department, taken from envelopes and gambling cases where money was ordered confiscated by various judges of the Municipal Court. These moneys are properly payable to the Policemen's Annuity and Benefit Fund of Chicago, under Section 11-19 of the Municipal Code of Chicago, and should be forwarded to such Fund.

D. OTHER ANNUITY AND BENEFIT FUNDS

RE-ENTRY OF A PENSIONER IN SAME DEPARTMENT

(No. 10947—*Municipal Employees' Annuity and Benefit Fund—G. F. M., Jr.—Mar. 4, 1947.*)

An annuitant who is re-appointed a deputy Municipal Court Clerk after he has attained the age of 65 is not entitled to receive his annuity while so employed. Said annuity shall in such case be suspended during such period.

Citation: IRS '45, Ch. 37, Sec. 538.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the rights of an annuitant of your Fund, the following is submitted:

Your letter of information and your records disclose that the subject became an annuitant of your Fund on July 22, 1945, and was entitled to receive an annuity of \$26.23 for life; that as of February 17, 1947, he was

reappointed as a deputy clerk in the office of the Clerk of the Municipal Court of Chicago; that his appointment there is temporary, and no deductions are to be taken from his salary and paid into your Fund; that he is at the present time over the age of sixty-five years.

You have requested advice as to whether or not an annuity should be paid to him during the period of his employment as a deputy clerk of the Municipal Court, and also whether or not he should be paid annuity for the period from January 22, 1947, the date of his last annuity payment, to February 16, 1947, inclusive, during which time he was not an employee of the Municipal Court.

Section 34 of the Act governing your Fund (Ill. Rev. Stats. 1945, Ch. 37, Sec. 538), in paragraph (b) thereof, provides:

"When any employee shall reenter the service after he shall have attained an age of sixty-five (65) or more years, payments on account of any annuity previously granted to such employee shall be suspended during the time thereafter that he shall be in the service, and when he shall again resign or be discharged therefrom, payments upon the annuity previously granted shall be resumed."

In regard to the second portion of your inquiry, while it is true that your Act provides that "no payment shall be made for any part of the monthly period in which the annuitant shall die," no provision is made for withholding annuity for the entire month where the annuitant remains alive but reenters the service before the expiration of the month.

Your Fund should therefore suspend the annuity as of February 17, 1947, for such period of time as he is employed in the office of the Municipal Court of Chicago. He should, however, receive his proportionate share of his monthly annuity for the period from January 22, 1947, to and including February 16, 1947.

RE-ENTRY OF PENSIONER IN DIFFERENT DEPARTMENT

(No. 10948—*Election Comm'rs Pension Fund*—G. F. M., Jr.—Mar. 7, 1947.)

An annuitant who earned his pension as an employee of the Board of Election Commissioners may continue to receive said annuity even though presently employed by the Finance Committee of the City of Chicago. Such new service shall not be computed so as to increase the annuity.

The phrase "reenter the service", as used in the annuity and benefit fund acts, refers to and means the same service in which a person has earned the annuity or pension.

Citation: 292 Ill. App. 390.

OPINION OF FOREGOING SYNOPSIS

Your records disclose that the subject was an employee of the Board of Election Commissioners from June 14, 1926, to July 31, 1936; that when

she left the service of the Board of Election Commissioners on July 31, 1936, she became entitled to an annuity of \$13.10 per month for life; that such annuity was paid from September 1, 1936, to June 1, 1937, when payments were discontinued because she became an employee of the Finance Committee of the City of Chicago; that she has been employed by the Finance Committee ever since, with the exception of certain months during 1938, 1939, and 1940, for which months she has been paid her annuity.

Your Board would like to be informed as to the following:

1. Is the applicant entitled to annuity payments?
2. Shall payments be resumed?
3. Shall the applicant be paid for the time omitted in one lump sum, or
4. Shall a new computation be made by the Actuary as to the monthly amount she would receive?

In response to question No. 1, the applicant is entitled to receive annuity payments even though she is employed in another branch of the service of the City of Chicago. The Appellate Court of the State of Illinois, in the case of *Kelly v. Retirement Board of Firemen's Annuity and Benefit Fund of Chicago*, 292 Ill. App. 390, held that the phrase "reenter the service," as used in the annuity and benefit fund acts, refers to and means the same service in which a person has earned the annuity or pension.

In response to question No. 2, annuity payments to the applicant should be resumed.

In response to question No. 3, the applicant should be paid the annuity to which she was entitled for the months during which she was not paid annuity while in the service of the Finance Committee. As this was money withheld from her in error, the accumulated amount should now be paid to her in a lump sum.

In response to question No. 4, no new computation should be made for the applicant, as her annuity was fixed at the time she left the service and cannot be increased, since she has rendered no further service to the Board of Election Commissioners.

PENSION MEMBERS' ILLEGITIMATE CHILD

(No. 11001—*Laborer's Annuity and Benefit Fund*—G. F. M., Jr.—Oct. 16, 1947.)

Payment of a Child's Annuity cannot be made to an illegitimate child who was later adopted by the deceased, a member of the Laborers and Retirement Board Employees Annuity and Benefit Fund.

Citations:

Statute: IRS '45, Ch. 24, Sec. 1151.
Case: 295 Ill. App. 431.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion regarding the annuity which might be payable to an adopted child of one of your members, the following is submitted:

Your letter of information indicates that a member of your Fund, now deceased, was the father of a child born out of wedlock; that said member married, but not the mother of the child; that after the marriage the said member and his wife adopted the aforesaid child. Your question is as to the eligibility of this child to receive an annuity from your Fund.

Section 44 of the Act governing your Fund (Ill. Rev. Stats. 1945, Ch. 24, Sec. 1151) provides in part thereof as follows:

"Annuity to be known as 'child's annuity' shall be provided for unmarried children the issue of contributors . . ."

In the case of *Wittbrodt v. Woodland*, 295 Ill. App. 431, the Appellate Court of Illinois, in interpreting the child's annuity provision of the Act governing the Park Policemen's Annuity and Benefit Fund of Chicago (which wording is similar to the wording of your Act) held that the word "child" or "children" meant legitimate child or children.

In the above mentioned *Wittbrodt* case a deceased Park policeman was living with a woman whom he represented to be his wife, although he was married to another woman and had never been divorced from her. There were born to this couple out of wedlock a number of children. The aforesaid policeman recognized them as his children and lived with them and their mother in normal family relationship.

The policeman died and the mother of the children applied for a widow's pension and for child's annuity, which was paid to her until investigation disclosed that she had never been married to the policeman, whereupon the Board ordered the payments stopped. Suit was filed for child's annuity, maintaining that the children involved were the issue of the policeman, which contention was not denied. The Court, however, held that the children were not entitled to receive annuities, inasmuch as they were not legitimate children.

I am therefore of the opinion that Section 44 of the Act governing your Fund must be construed in accordance with the finding of the Court in the above mentioned case, and that payment of annuity cannot be made to the illegitimate child of the above mentioned deceased member of your Fund.

REPLACING PENSION TRUSTEE

(No. 11012—House of Correction Pension Fund—G. F. M., Jr.—Dec. 19, 1947.)

Under the Act governing the Pension Fund of the House of Correction, an election must be held to fill the unexpired portion of the term of a member of the Board of Trustees who resigns. The new member must be elected solely by ballot of such contributors and must himself be a member of the Fund.

Citation: IRS '47, Ch. 67, Secs. 22, 23.

OPINION OF FOREGOING SYNOPSIS

Your letter of December 15, 1947, states that a contributor to your Fund, and a member of the Board of Trustees, has left the employ of the

House of Correction; that the term for which he was elected a member of the Board of Trustees does not expire until September 30, 1950; and that you desire an opinion as to whether or not it will be necessary to hold a special election for the purpose of filling the vacancy occasioned by his resignation.

Section 5 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 67, Sec. 22) provides in part as follows:

"The said board of trustees shall consist of the chairman of the board of inspectors and the superintendent of the house of correction, four employees contributing to the fund and one member from the beneficiaries. The chairman of said board of inspectors and the superintendent of the house of correction shall be ex-officio members of such board of trustees, and the five (5) other members of such board of trustees shall be elected by ballot, the members of the contributors to be elected by the employees contributing to said fund . . ."

Section 6 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 67, Sec. 23) provides in part as follows:

"Whenever any elective member of said board of trustees shall cease to be in the employ of or to be a member of said board of inspectors of said house of correction, or a beneficiary of the house of correction employees' fund, his or her membership in said board of trustees shall cease. All vacancies in said board of trustees shall be filled by a ballot as aforesaid."

Under the Act governing your Fund, it is necessary that an election be held to fill the unexpired portion of the term as a member of the Board of Trustees. As he was a contributor to your Fund, the member to be elected to fill his place on the Board of Trustees must also be a contributor to your Fund, and is to be elected solely by ballot of such contributors.

"PER DIEM" EMPLOYEES

(No. 11032—Election Commissioners Pension Fund—G. F. M., Jr.—Feb. 17, 1948.)

A temporary employee on a "per diem" basis in the Board of Election Commissioner's Office is not entitled to membership in their pension fund.

Citation: IRS '47, Ch. 46, Sec. 507.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion as to whether or not service credit should be allowed to certain employees of the Board of Election Commissioner's Employees' Annuity and Benefit Fund for the periods of time during which such employees held positions in the office of the Board of Election Commissioners on a per diem basis, the following is submitted:

Section 12 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 46, Sec. 507) defines "Employee" as follows: •

"'Employee'; Any person who was, is, or shall be employed by said election commission the money for whose salary is provided by appropriation made by the city council of such city and whose salary is paid by such city, and whose position in the service of said election commission ordinarily requires actual performance of duty during not less than ten months in each calendar year: . . ."

It will be noted that eligibility to membership in your Fund depends upon three conditions:

1. That the money for the employee's salary is provided by appropriation made by the City Council of the City.
2. That his salary is paid by such City.
3. That his position in the service ordinarily requires actual performance of duty during not less than ten months during each calendar year.

A temporary employee on a per diem basis is not eligible for membership in your Fund because he is reengaged each day for work and he does not hold a position which ordinarily requires actual performance of duty during not less than ten months in each calendar year.

CERTIFICATION AFTER AGE OF 35

(No. 11057—House of Correction Pension Fund—G. F. M., Jr.—May 12, 1948.)

Persons who are over the age of 35 before being certified from an eligible list as guards at the House of Correction are not eligible for membership in the Pension Fund.

Citation: IRS '47, Ch. 67, Sec. 19.

OPINION OF FOREGOING SYNOPSIS

In response to your request for an opinion concerning the eligibility for membership in your Fund of certain guards about to be appointed to the House of Correction, the following is submitted:

Your letter states that a recent civil service examination was held for the position of guard at the House of Correction; that an eligible register has now been made up of those eligible for appointment to the position of guard; and that many of those eligible for appointment are over the age of thirty-five years, and were over such age of thirty-five years at the time of taking the examination. Your question is as to whether or not those on the eligible list who are over the age of thirty-five years would be eligible for participation in the pension fund in the event they were appointed to the position of guard.

Section 2 of the Act governing your Fund (Ill. Rev. Stats. 1947, Ch. 67, Sec. 19) defines employee as follows:

"The term 'employee' under this Act, shall include all persons in the employ of any such house of correction under and by virtue of an Act entitled, 'An Act to regulate civil service of cities,' approved and in force March 20, 1895, and for those who were appointed prior to the passage of such Act and who were in the service of such house of correction July 1, 1911. The term 'employee' shall also include any person in the employ of such house of correction who passed the civil service examination prior to his or her thirty-fifth birthday, provided, that such person, to become a contributor under this Act, shall pay into the fund an amount equal to the salary deductions which would have been made from the date of his or her thirty-fifth birthday had he or she been a regular contributor during such period, but such person shall not be eligible to any benefits under this Act until two years from the date of becoming a contributor: . . . And, provided, further, that this Act shall apply only to those employees who voluntarily accept and agree to comply with its provisions."

It is expressly provided in the above definition that employees of the House of Correction who become such employees after the year 1911 be less than thirty-five years of age at the time of their passing the civil service examination, in order to be eligible for participation in the House of Correction Employees pension Fund. It therefore follows that those employees who had attained the age of thirty-five prior to the date of their passing the recent civil service examination for guards at the House of Correction are not eligible for participation in your Fund.

PENSIONER ON PAYROLL

(No. 11085—*Superintendent, M. T. S.—C. H. L.—Nov. 29, 1948.*)

A retired Fire Department employee who is receiving a pension has the right to be employed and draw a salary from the Municipal Tuberculosis Sanitarium while receiving such pension.

Citations:

Case: 292 Ill. App. 390.

Other reference: Op. Corp. Coun. No. 10948, Mar. 7, 1947.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your communication of November 19, 1948 in which you ask us to render an opinion

"as to whether an employee can be employed and receive salary from the Municipal Tuberculosis Sanitarium when this said employee is receiving an annuity from a pension fund partially supported by tax money; or if this said employee were employed could he lawfully waive his benefits temporarily while employed by the Municipal Tuberculosis Sanitarium."

In your letter you refer particularly to a retired Fire Department employee who is receiving an annuity from the Firemen's Annuity and Benefit Fund which is in part supported by tax money.

In response to your question we refer to the case of *Kelly v. Retirement Board of Firemen's Annuity and Benefit Fund*, 292 Ill. App. 390 where the court held that Kelly, an engineer in the Fire Department who had retired and was receiving a pension from the Firemen's Annuity and Benefit Fund was permitted to draw salary as an employee of the Board of Education and at the same time continue to draw his pension, holding that the phrase "reenter the service" as used in the annuity and benefit fund acts refers to and means the same service in which a person has earned the annuity or pension.

We are therefore of the opinion that a retired Fire Department employee who is receiving a pension has the right to be employed and draw his salary from the Municipal Tuberculosis Sanitarium while receiving such pension.

CHAPTER IV — RELATIONS OF CITY WITH OTHER GOVERNMENTS

A. CHICAGO HOUSING AUTHORITY

C. H. A. EMPLOYEES—HATCH ACT

(No. 11013—Ald. 5th Ward—A. J. R.—Dec. 24, 1947.)

Employees of the Chicago Housing Authority are subject to the provisions of the Hatch Act.

Citations:

Statute: U. S. Code, Title 18, Sec. 61-6.

Case: 61 Fed. Supp. 355.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your letter of December 17th in which you request an opinion as to whether or not the employees of the Chicago Housing Authority are subject to the provisions of the Hatch Act.

The section of the Hatch Act which governs this question is section 61 L of Title 18 of the United States Code. It provides among other things that it shall apply to all officers or employees "of any State of local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any federal agency." It exempts officers holding elective offices.

It is clear from the language of the provision we have quoted that the Hatch Act does not apply only to federal employees. In our opinion employees of the Chicago Housing Authority are within the scope of its provisions.

This view is supported by the decision of the District Court of the Northern District of Oklahoma in *State of Oklahoma v. United States Civil Service Commission*, 61 Fed. Supp. 355. In that case the United States Civil Service Commission had ordered the suspension from office of one France Paris, a member of the Oklahoma Highway Commission, or in lieu thereof that federal funds be withheld from the state of Oklahoma upon its refusal to order the suspension.

The Hatch Act was the basis for the order of the United States Civil Service Commission. The Oklahoma Highway Commission received support from and was benefited by funds obtained from an agency of the federal government. While serving as a member of the Commission, Paris also served as chairman of the State Central Committee of the Democratic Party of Oklahoma. The District Court held that a violation of the Hatch Act was established and it sustained the order of the Civil Service Commission.

INVESTING C. H. A. FUNDS

No. 11091—Ald. 37th Ward—J. F. G.—Dec. 14, 1948.)

Approval by the Mayor or the City Council is not necessary to enable the Chicago Housing Authority to invest money turned over to it by the City for relocation housing purposes in short term government securities until actually needed.

Citations:

Statute: Housing Authorities Act of 1934, as amended.
 Housing Cooperation Law of 1937, as amended.
 Blighted Areas Redevelopment Act of 1947.
 State Contribution Act, 1947, Sec. 5.
 IRS '47, ch. 146½, par. 3.1, pp. 3357, 3358.

OPINION OF FOREGOING SYNOPSIS

I am in receipt of your letter of December 8, 1948, enclosing copy of a resolution introduced by Alderman DuBois directing "that all City of Chicago money held by the Chicago Housing Authority be invested in Federal notes or bonds until actually needed for the specified purpose for which they are intended." You request our opinion as to whether approval by the Mayor or the City Council is necessary to enable the Chicago Housing Authority to invest funds turned over to it by the City for relocation housing purposes in short term government securities.

An examination of the Housing Authorities Act of 1934, as amended, the Housing Cooperation Law of 1937, as amended, and the act in relation to rehousing of persons residing in redevelopment projects undertaken pursuant to the Blighted Areas Redevelopment Act of 1947 disclose that in none of the acts referred to is there any express or implied power in the housing authorities to invest surplus funds in government securities.

Housing Authorities are created as municipal corporations exercising public and essential governmental functions (Sec. 8, Housing Authorities Act). They are autonomous governmental agencies and independent of the corporate authorities of other municipalities in the control of their property and funds granted and paid into the treasury of the housing authorities, subject, however, to the following:

1. In Chicago, the housing authority must submit to the City Council statements of its financial condition, including operating receipts and disbursements at the close of each fiscal year (Sec. 8, Housing Authorities Act).

2. All projects are subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the project is to be situated (*id.* Sec. 10).

3. Agreements for the payment of service charges in lieu of taxes (*id.* Sec. 29; Housing Cooperation Law, Sec. 5b).

4. Agreements relating to conveyance or lease of City property, dedication and vacation of streets, alleys and public grounds, grants or loans of money and numerous municipal services in aid of the performance of the functions of the housing authority (Housing Cooperation Law, Sec. 4).

5. Approval of the sale or conveyance by the land clearance commission to the housing authority of property for public housing (Blighted Areas Redevelopment Act, Sec. 18).

6. Approval of the acquisition of property in the city of Chicago (State Contribution Act of 1947, Sec. 5).

Certainly the City Council has no power to direct the Chicago Housing Authority to invest any funds in its possession earmarked for public housing projects or derived from the sale or transfer of property acquired by the Authority.

There is, however, a provision in our State law which we believe is sufficient authority for the Chicago Housing Authority to invest in government securities surplus funds not immediately necessary for the purpose for which they are held by the Authority. Section 1 of An Act concerning municipal funds (Ill. Rev. Stat. 1947, Chap. 146½, par. 3.1, pp. 3357 and 3358) provides:

"Every county, park district, sanitary district, or other municipal corporation, holding in its treasury funds which are set aside for use for particular purposes, but which are not immediately necessary for those purposes, by ordinance, may use those funds, or any of them, in the purchase of * * * municipal bonds issued by the * * * municipal corporation, possessing the funds and representing an obligation and pledging the credit of that * * * municipal corporation, or bonds and other interest bearing obligations of the United States or of the State of Illinois. All interest upon these bonds or obligations and all money paid in redemption of these bonds or obligation or realized from the sale thereof, if afterwards sold, shall at once be credited to and placed in the particular fund used to purchase the specified bonds or obligations."

The Chicago Housing Authority is a municipal corporation within the meaning of the foregoing act.

Although we believe there is no harm in a resolution of the City Council suggesting or requesting the investment of money donated by the City of Chicago until needed for the purpose for which the donation was made, the Authority may not be coerced to make such an investment. If the City had the right to order the Authority to invest its surplus funds it would have the power to direct the investment of the funds in specified municipal or federal bonds or notes. By complying with the order of the City Council the Chicago Housing Authority would be unlawfully avoiding a responsibility imposed upon the Authority by State Law.

Approval by the Mayor or the City Council is not necessary to enable the Authority to invest any of its funds, including money donated by the City.

B. FEDERAL RELATIONSHIPS

ALLEY-SCALE FEE FOR HOTEL

(No. 10738—City Comptroller—M. H. F.—February 16, 1943.)

The ownership or possession by the War Department of the Congress Hotel property does not relieve the Congress Hotel Corporation or the surety on their bond, from the obligation to pay the compensation required under the City's Scale Ordinance for the maintenance of a weighing scale in the alley at the rear of the hotel.

Citation: Coun. J. p. 2531, Nov. 5, 1936.

OPINION OF FOREGOING SYNOPSIS

Your communication dated February 9, 1943, forwards a copy of a letter addressed to the city collector January 18, 1943 by the Congress Hotel. The letter states that the collector's final notice re warrant for collection No. F-1991, in the amount of \$25.00, billed to the Congress Hotel and Annex, is returned and the collector informed that all matters concerning the Congress Hotel are entirely out of the hotel's hand "due to the fact that the War Department has taken possession for the duration." You inform us that the amount involved was billed for the privilege of maintaining a weighing scale in the alley in the rear of 518 S. Michigan Avenue under an ordinance passed November 5, 1936, and you request our advice whether you should look to the hotel and the Metropolitan Casualty Company of New York, surety on the hotel's bond, for payment of the compensation so long as the scale is maintained.

We find that the maintenance of the scale was authorized by an order of the city council passed November 5, 1936 (Coun. J. p. 2531), which reads as follows:

Ordered, That the Commissioner of Public Works be and he is hereby authorized to issue a permit to Congress Hotel, Inc., a corporation, to maintain and use as now constructed a scale in the alley adjoining the premises located at No. 518 S. Michigan avenue, for a period of ten (10) years from November 1, 1936, in accordance with plans and specifications filed with and approved by the said Commissioner of Public Works, upon the filing of the application and bond and payment of the initial compensation provided for by ordinance, except that said compensation shall be paid annually, in advance.

Presumably the order was passed pursuant to article XVI of chapter LXV of The Chicago Municipal Code, 1922. This article relates to scales in streets or alleys, and covers the matter of procuring permits to maintain scales in the streets and alleys or other public places, upon payment of compensation to the city and upon filing an indemnity bond to protect the city and to insure the removal of the scale and the restoration of the public way.

The Department of Public Works has exhibited to us the original application filed by Congress Hotel, Inc., a copy of the permit issued, and

the original bond in the sum of \$10,000, dated November 5, 1936, executed by Congress Hotel, Inc., as principal and The Metropolitan Casualty Insurance Company of New York, as surety. The bond is conditioned upon the performance of all and singular the conditions and provisions of the permit and the ordinances of the city. The ordinance provides that the permit may be revoked by the Commissioner of Public Works upon failure or neglect to comply with the ordinance, and for the restoration of the alley without expense to the city at the expiration of the privilege granted by the permit. The failure on the part of the permittee to pay the compensation exacted by the ordinance is sufficient cause for the revocation of the permit.

The Bureau of Compensation apprises us that it has received a War Department communication stating that the scale "has been disconnected and is no longer in use."

While the War Department may have taken over the Congress Hotel and Annex, the scale in question is located in the public alley and not upon private property formerly owned by the hotel company and now said to be owned or controlled by the War Department. Therefore it is our opinion that the ownership or possession by the War Department of the hotel property does not relieve Congress Hotel, Inc., or the surety on said company's bond, from the obligation to pay the compensation required and to observe and perform all and singular the conditions of the permit and the ordinance of the city. If Congress Hotel, Inc. defaults in payment of the compensation the city is in a position to exercise fully its rights under the ordinance.

It is suggested that Congress Hotel, Inc., and also The Metropolitan Casualty Insurance Company of New York, be formally notified of the city's demand for the payment of the compensation and the contents of this opinion.

VEHICLE STICKERS FOR FEDERAL AGENCIES

(No. 10757—City Clerk—M. H. F.—November 5, 1943.)

The City Clerk cannot issue licenses or vehicle license emblems for cars of the Defense Plant Corporation free of charge.

Citations:

Ordinances: Mun. Code: 29-15, 29-16.

Cases: 318 U. S. 261.

OPINION OF FOREGOING SYNOPSIS

Your communication of November 3, 1943 requests our opinion as to whether the City Clerk is required or permitted to furnish vehicle licenses and vehicle license emblems free of charge to the Defense Plant Corporation, for use on vehicles owned by that corporation, (a) when such vehicles are used directly by officers or agents of the corporation, or (b) when such vehicles are used by contractor or subcontractor corporations engaged in the production of equipment and materiel to be used by the United States Government or its allies in the prosecution of the current war.

Sections 29-15 and 29-16 are the pertinent sections of the Municipal Code of Chicago. Section 29-15 reads as follows:

"All vehicles owned and operated by the city of Chicago, the Chicago public library, the United States government, and the municipal tuberculosis sanitarium, shall be exempt from the provisions of the chapter requiring the payment of a vehicle tax. Every vehicle owned by the United States Government which is not plainly marked to indicate that it is the property of the United States Government shall at all times while being operated upon the public ways of the city have a metal plate or transparent sticker license affixed thereto of the kind and type provided in sections 29-6 and 29-7, to be furnished by the city clerk free of charge. Provided, however, that every vehicle owned or operated by the city, the Chicago public library and the municipal tuberculosis sanitarium shall have, at all times while being operated upon the public ways of the city, the name of the governmental agency owning said vehicle, painted in letters at least one and one-half inches in length, in a conspicuous place on the outside of each side of such vehicle. Provided, further, that every vehicle owned or operated by the city, the Chicago public library and the municipal tuberculosis sanitarium while being operated upon the public ways of the city shall at all time have affixed to said vehicle a metal plate as hereinafter provided."

Section 29-16 reads in part as follows:

"The city clerk shall, upon direction of the mayor, issue vehicle license plates without charge to the city, the Chicago public library and the municipal tuberculosis sanitarium. The said license plates shall be circular in form and approximately four inches in diameter, and shall bear the words: 'CHICAGO OFFICIAL VEHICLE' and a designating number and the year for which such license plate is issued."

The above mentioned sections state the limit of your authority to issue vehicle licenses and vehicle license emblems free of charge. Except as authorized in these sections our opinion is that you are not authorized to make any gratuitous issuance.

The Defense Plant Corporation is a corporation created by the Reconstruction Finance Corporation pursuant to the Reconstruction Finance Corporation Act, as amended, to aid the Government of the United States in its national defense program. We do not understand that the Defense Plant Corporation has a situs in Chicago. It is not a "person residing within the city," and, therefore, not subject to license under the Wheel Tax Ordinance. The question whether vehicles owned or operated by it (if any such there are in Chicago) are vehicles owned or operated by the United States Government, appears to be unnecessary for determination. If there are United States Government owned vehicles being operated by the Defense Plant Corporation on the public ways of the city they should be plainly marked so that their United States Government ownership may be made known to the city's police force. As we interpret section 29-15 of the Municipal Code it seems to have been the intent of the City Council to authorize you to issue vehicle license emblems free of charge to only those United States Government owned vehicles which were not plainly marked and for obvious reasons could not be expected to be plainly marked, for the reason that it might neutralize their effectiveness when used by agents of the Federal Bureau of Investigation, the Alcohol Tax Unit, the Narcotics Bureau, or similar secret services. There being no reason why a United States Government owned vehicle operated by the Defense Plant Corporation should not be plainly marked to disclose its identity, our opinion is that you would not be authorized to issue vehicle license or vehicle license emblems free of charge for such vehicle.

Resident contractor or subcontractor private corporations engaged by the Defense Plant Corporation to construct defense plants or operating plants producing equipment and materiel to be used by the United States Government or its allies, like all other residents of the city are subject to local laws and regulations. In the case of *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U. S. 261, 87 L. Ed. 549, 63 Sup. Ct. 617, decided March 1, 1943, the court discussed the question of immunity from local regulations. The fact that nondiscriminatory taxation or regulation of a contractor by a State imposes an additional economic burden on the Federal Government was thought not to bring the contractor within any implied immunity of the Federal Government from State taxation or regulation. The court said:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on the citizens of the United States within the state's borders. * * * And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system. * * *

"Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require."

Our opinion therefore is that the vehicles owned or operated by the resident contractor or subcontractor corporations mentioned in your communication are subject to license under the city's Wheel Tax License Ordinance.

BREAD PRICE INCREASE

(No. 10789—City Sealer—J. H. S.—June 9, 1944.)

In view of the price stabilization program of the Office of Price Administration the proposed municipal ordinance allowing a 25% increase in the size and price of a loaf of bread must be deemed to be superseded by the federal regulation for the duration of the emergency.

Citations:

Ordinances: Municipal Code, sec. 100-16.

Cases: 386 Ill. 284.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of May 24, 1944 advising that the Office of Price Administration has issued a supplementary regula-

tion No. 14-B which permits bakers of bread to increase the size of their loaves up to 25% over the March, 1942 size and to increase their maximum prices proportionately. You quote the following excerpt from the regulation:

"Sec. 2. WEIGHT INCREASES. Whenever the weight of any loaf or product is increased over the weight of the loaf or product as produced in March, 1942, the new loaf or product shall be deemed a new product; and the maximum price of every seller of such new loaf or product must be determined under section 2(b) or section 3 of the General Maximum Price Regulation: PROVIDED, That any baker may increase the weight of his loaf of bread up to a weight 25 per cent over the weight of his loaf of bread as produced in March 1942, in which case the baker and all other sellers of such increased loaf of bread may increase their maximum prices therefor proportionately, per ratio of weight."

You request our opinion as to whether or not this regulation conflicts with the provisions of section 100-16 of the Municipal Code of Chicago which establishes standard weight of loaves.

In a superficial aspect it would seem that the regulation of the Office of Price Administration is purely permissive and that under that regulation bakers may increase the weight of loaves of bread up to 25% over the weight of the loaf as produced in 1942 and increase the selling prices proportionately, but does not require such increase in weight. Accordingly, it might seem that there is no reason why the provisions of section 100-16 of the Municipal Code of Chicago should not continue to be effective. The situation, however, presents consideration which go deeper than the superficial aspects.

In a recent decision by the Supreme Court of Illinois in *Regan v. Kroger Grocery & Baking Company*, 386 Ill. 284 (1944) the Court observed that the Federal Emergency Price Control Act was enacted by Congress pursuant to its war powers in order to stabilize prices. The price and weight of bread are so closely interwoven that there is great doubt that the weight can be controlled without seriously interfering with the price stabilization program of the Office of Price Administration. In view of this doubt, we are constrained to hold that the Federal Government has pursuant to its emergency war powers elected to occupy the entire field of price stabilization and incidentally the weight of bread. In this view of the matter, section 100-16 of the Municipal Code of Chicago must be considered superseded by the regulations of the Office of Price Administration for the duration.

MERIT BADGES

(No. 10797—City Comptroller—M. H. F.—June 26, 1944.)

The Federal Excise Tax of 20% is not applicable to purchases of badges to award to city police officers for bravery. Under the Federal Code "no tax shall be imposed with respect to the sale of any article for the exclusive use of the United States, any State, Territory of the United States, or any political subdivision of the foregoing."

Citation: Vol: 26, ch. 19, sec. 2400 U. S. C. A.

OPINION OF FOREGOING SYNOPSIS

You have asked our advice concerning the question whether the City of Chicago is obligated to pay the 20% Federal Retailers' excise tax on the purchase of certain medals awarded members of the Police Department for acts of bravery.

Section 2400, as amended, of Chapter 19, of the Federal Retailers' Excise Tax Act, Volume 26, U. S. Code Annotated, which imposes a tax of 20% of the sales price on jewelry, is not, in our opinion, applicable to the City of Chicago for the reason that by section 2406 of the same act it is provided that under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, no tax under the chapter shall be imposed with respect to the sale of any article for the exclusive use of the United States, any State, Territory of the United States, or any political subdivision of the foregoing. The City of Chicago being a political subdivision of the State of Illinois, and inasmuch as the medals in question apparently are for the exclusive use of the city, our opinion is that the tax is not collectible from the city.

DREDGING DAMAGE

(No. 10826—Commissioner of Public Works—A. F. G.—December 20, 1944.)

The protection of city owned cables in the Chicago River during dredging operations by the federal government is the concern of the city and no claim against the federal government for damages to cables would be allowed.

Citations:

- Cases: 229 U. S. 82.
 14 Fed. (2d) 98.
Other references: 45 C. J. 425.
 45 C. J. 445.
 45 C. J. 447.

OPINION OF FOREGOING SYNOPSIS

We acknowledge your letter of November 27, 1944 which is as follows:

"On various occasions during the past few years the United States Government, with its equipment or through contractors, has dredged portions of the river within or close to the draws of City bridges. In some of these cases there has been danger of damaging or destroying the submarine cables used for bridge power, signaling and interlocking purposes. These are an essential part of the bridge and are installed as part of the bridge construction for which United States Government and State permits were obtained when these structures were built.

"To insure against the loss of these cables from dredging operations since replacements are impossible as a result of war conditions, it has been necessary for the Division of Bridges and Viaducts to pull these cables as their loss would render the bridge or its equipment inoperative; also the value of the cable may ordinarily make it advisable to pull same under these circumstances. Invariably, notices have been received from the United States Government or the contractor for the proposed dredging and for reasons previously mentioned, we have taken the necessary steps to save our cables.

"It is to be noted that the Federal Government has jurisdiction, over navigable waters. Because of this authority, bridges and other structures affecting navigation are constructed only upon the issuance by the Federal Government of a permit for such structures. There is no question raised with reference to this point.

"However in cases of maintenance by the Federal Government of the Chicago River system by dredging or otherwise, the question arises whether the City may be required by the Federal Government under its jurisdiction over navigable waters to remove, at the City's expense, cables located in the river bed, or other bridge facilities, to permit dredging of the river.

"Will you please advise whether the protection of the City's facilities is required to be done at the City's cost or whether in such cases we may present a claim to the Federal Government."

The right of navigation is the dominant right in navigable waters. 45 Corpus Juris 445. Navigators using the stream in a lawful manner are not liable to riparian owners for unavoidable injury caused thereby, or for hindering or obstructing other navigators, or for injury to a submarine cable the location of which was not known. 45 Corpus Juris, p. 447 citing *The Georgie*, 14 Fed. (2d) 98, (1926).

In this case the United States maintained a submarine telephone cable in San Francisco Bay. At the time of the injury complained of there was no monument or sign at the pier or elsewhere to indicate the location of the cable. Nor was its location indicated on any of the charts of the bay. The pilot of the Steamship *Georgie* in docking his boat at the pier dropped his anchor, and when the anchor was raised it carried the cable with it, causing the injury complained of. In hold the boat not liable the court said:

"The public right of navigation in all navigable waters is the dominant one, and should a private corporation lay a cable in public waters without notice or warning, we apprehend it will not be claimed that such corporation could maintain an action against any vessel that might cause injury to the cable in the lawful exercise of this dominant right."

The Federal Government has control and jurisdiction over the navigable waters of the United States and in the exercise of its powers over navigable waters congress has authority to prohibit the creation of any obstruction in such waters and also to determine what shall constitute an obstruction to navigation, and to require the removal of obstructions, although they have been constructed under authority from a state and notwithstanding prior inaction or acquiescence on the part of the Federal Government, or even the express authorization of congress to erect the structure in question. 45 Corpus Juris 425.

The right to lay cables on the bed of the Chicago river even though sanctioned by the federal government is only a qualified right subject to the dominant right of the public to navigation, and when the government

in the exercise of its dominant right dredges or deepens the channel of the river no right to compensation for damage to its cables accrues to the city.

In *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, the Government cut a channel through the bed of waters in the interest of navigation in which the company had planted oyster beds destroying the property of the company. The company complained that this constituted a taking of property as to entitle it to compensation under the constitution.

In denying this claim the court said:

"If the public right of navigation is the dominant right and if as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation. * * *

"By necessary implication from the dominant right of navigation, the title to submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment may require. The plaintiff in error (the company) has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition."

It is our opinion, therefore, that the protection of the city's cables, during the operation of dredging is the concern of the city and no claim against the federal government for damages to cables would be allowed for the foregoing reasons. We think, however, that cooperation between your department and the government would greatly minimize damages.

DOUGLAS AIRPORT WATER MAIN

(No. 10893—Commissioner Public Works—J. F. G.—March 18, 1946.)

The City has power to establish and maintain a public airport, within or without the corporate limits. If the airport chosen is without the corporate limits the City may also acquire existing water mains as a necessary facility for air port purposes.

No References.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of March 8, 1946 to which is attached copy of our opinion of July 14, 1942 pertaining to the installation of water mains outside of the city limits for the supply of water from the Mayfair Pumping Station to a proposed bomber site, now known as the Orchard Place Airport in Park Ridge, Illinois. Since that opinion was rendered the United States Government constructed, at its own expense, approximately 20,500 feet of 24-inch steel water supply main from a connection to the City's mains at W. Bryn Mawr avenue and N. Canfield avenue (city limits) to the Orchard Place Airport which the City is about to acquire from the War Assets Corporation under the Surplus Property Act.

Your inquiry is directed for a determination of the City's right to acquire and maintain those water mains to furnish water to the airport. Our opinion of July 14, 1942 was limited to the power of the City to construct distribution lines from the city limits to furnish water to the property outside the city limits not in its control. Since the City has power to establish and maintain a public airport, either within or without the corporate limits of the city, and the City has selected the Orchard Place Airport, commonly known as the Douglas Airport, as part of the site for a public airport to be maintained by the City of Chicago, the City may also acquire the water mains described as a necessary facility for airport purposes, and if the capacity of the mains is greater than the needs of the City in connection with the maintenance of the airport permission may be granted to other public and private corporations and persons requiring water supply to make connections with these water mains when acquired by the City, subject to payment for water furnished through meters installed at such connections and to such other terms and conditions as may be imposed by the city authorities.

UNPAID INCOME TAX

No. 11060—General Counsel, C. H. 'A.—J. F. G.—June 16, 1948.)

The City of Chicago or any of its agencies is obliged to withhold the salary of an employee and pay it over to the Collector of Internal Revenue in response to a tax levy for delinquent federal income tax owed by said employee.

Citations:

Statute: 26 U. S. C. A. Secs. 3690, 3710.

Cases: 43 Fed. 2d 829.

82 Fed. 2d 242.

28 Fed. Supp. 907.

45 Ill. 133.

263 Ill. App. 291.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of June 4, 1948 requesting a ruling from this office as to whether or not a municipal corporation such as the Housing Authority is obliged to withhold the salary of an employee and pay it over to the Collector of Internal Revenue in response to a tax levy for delinquent federal income tax. We had occasion to consider this question in the year 1940 and following are excerpts from a letter which we prepared in reply to an inquiry of the same nature from the City Comptroller. Our search does not disclose any change in the federal statutes or in the rulings of the court cited in that opinion.

"The warrants for distraint were issued by the Collector of Internal Revenue pursuant to authority of the Internal Revenue Code (26 U. S. C. A. Sec. 3690) which provides:

"If and person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes,

with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.'

Section 3710 (26 U. S. C. A.) provides:

'(a) Requirement. Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

'(b) Penalty for violation. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

'(c) Person defined. The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.'

"As a general rule, in Illinois the salaries of officers and employees of the City are not subject to attachment, garnishment or creditors' suits for payment of their debts. This rule is based upon the grounds of public policy that the administration of government should not be interfered with nor harassed by such proceedings. (*Merwin v. City of Chicago, etc.*, 45 Ill. 133 (1867); *Goodwine State Bank v. Wise*, 263 Ill. App. 291 (1931).)

"However, immunity from the reach of creditors accorded by local law may not defeat a Federal taxlien. (*United States v. City of New York*, 82 F. (2d) 242 (1936).) It has been said authoritatively that the only excuse recognized by the Federal statutes for failure to comply with the demand of the Internal Revenue Collector is limited to an attachment or execution under any judicial process. No defense which the taxpayer may have against the payment of a tax is available to any person in possession of property or money due to the taxpayer. (*United States v. American Exchange Irving Trust Co.*, 43 F. (2d) 829 (1930); *Karno-Smith Co. v. Maloney*, 28 F. Supp. 907 (1939).)

"If the City should refuse to turn over to the Collector of Internal Revenue the amount owing to..... at the time of the service of the notice of levy it would be liable not only for the amount then due him as salary but also for the costs and interest from the date of the levy under Section 3710 (b) above quoted. We, therefore, advise immediate compliance with the demand."

C. RELATIONSHIPS WITH OTHER GOVERNMENTS

HOUSING FOR DEFENSE WORKERS

(No. 10742—Chicago Housing Authority—N. N. E.—January 4, 1943.)

The Chicago Housing Authority, in cooperation with Federal Agencies, can engage in a housing program to provide shelter for persons engaged in National Defense Activities.

Citations: House Bill 987, sec. 31.

OPINION OF FOREGOING SYNOPSIS

In accordance with your instructions we have examined the following documents:

Agreement for Revision and modification of contract for loan and annual contributions between the Chicago Housing Authority and Federal Public Housing Authority

(Project Nos. ILL-2-1,2-2)

Agreement—Comprising Part One of *Contract For Financial Assistance* between Chicago Housing Authority and Federal Public Housing Authority for

Project Nos. ILL-2-2, 2-3, 2-4 and 2-5

Agreement—Comprising Part One of *Contract For Loan and Annual Contributions* between Chicago Housing Authority and Federal Public Housing Authority for

Project Nos. ILL-2-1, 2-6

These documents, we are informed, are the standard forms approved by the Federal Public Housing Authority.

You have requested that we advise you whether the Chicago Housing Authority, working in cooperation with the Federal Government, could engage in a housing program to provide shelter for persons engaged in National Defense Activities. Section 31 of House Bill 987 which is an amendment to the Housing Authorities Act, states as follows:

"Any housing authority may, in case of emergency created in its area of operation by the National defense program, apply to the State Housing Board for a certificate of emergency, submitting with such application a statement of reasons therefor."

Since you have received a certificate of emergency from the State Housing Board you, of course, are authorized to engage in such a program.

USE OF BUILDING CODE.

(No. 10833—A. F. G.—January 25, 1945.)

Any municipality is free to use any of the provisions of the Chicago Building Code for incorporation in their ordinances.

Citation: 27 Fed. 61.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of January 18, 1945, in which you state that a committee of your village is working on a revision of your building code. That the committee believes that for a number of reasons the Chicago building code offers the best model available upon which to pattern the new code. You state also that in preparing the code your committee has taken the Chicago building code section by section, using the same section numbering system, retaining the language whenever possible and revising only such parts as are necessitated by local conditions.

You then say: "I should very much appreciate your advise as to whether there would be an objection on the part of the City of Chicago, because of copyright reasons, to our adopting the Code in this form and having it published for use in the Village of Glencoe, and whether it would be necessary for us to obtain formal permission from the city before doing so".

The laws of a state or the ordinances of a municipality are open to the world. They are public records subject to inspection by every one. Neither the state nor the municipality asserts any proprietary interest in its statutes or ordinances and they may be digested, compiled or copied by anyone. In *Davidson v. Wheelock*, 27 Fed. Rep. 61, the complainant which had been awarded a copyright to print, publish and sell the General Statutes of the State of Minnesota as edited and prepared by the commission named by the legislature, containing his head and marginal notes and his references, sought an injunction to restrain the defendant from publishing the laws of the state. In denying the injunction to restrain the publication by the defendant of the laws of the state the court said:

"They (the statutes) may be digested or compiled by anyone, and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him."

Many of the states laws are taken bodily from the statutes of other states. Ordinances, too, are frequently copied from ordinances of other municipalities. It has become a general practice by many legislatures to adopt uniform laws on many subjects, such as Negotiable Instruments, Sales, Traffic, Divorce and the like, so that now the laws of many states are identical on these subjects.

We are, therefore, of the opinion that you are free to use any of the provisions of the Chicago building code for incorporation in your ordinance and no formal permission of the city is necessary.

We would suggest, however, that your committee consult with the commissioner of buildings of Chicago, who has recently recommended a large number of amendments to the building code, which clarify, remove ambiguities and reconcile conflicting sections of that code.

MUNICIPAL COURT JURISDICTION

(No. 10867—Judge, Municipal Court—J. F. G.—November 15, 1945.)

The Municipal Court has no jurisdiction in a suit involving a foreign consul. If moral turpitude is involved and the nature of the case warrants, the State Department should be notified for such action as may be deemed advisable to preserve the friendly relations between the foreign government involved and the United States.

Citations:

Statute: U.S.C.A. Title 28, Sec. 371.

Cases: 79 Fed. 751, 752.

254 Ill. 360.

202 Ill. App. 553, 556.

177 Misc. 139. (N.Y.)

196 N. Y. S. 442, 445.

Other references: Stewart, Consular Privileges and Immunities (1926) p. 157.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of November 8, 1945 requesting our opinion as to your jurisdiction to try a person accredited to the United States as consul of the Swiss Government, and formally recognized by exequatur of our government, who is charged with having committed a misdemeanor within the territorial jurisdiction of your court. We assume that the offense referred to is the violation of a city ordinance which bears no relation whatsoever to the powers entrusted in or duties imposed upon the consul by virtue of his office. Implicit in your inquiry is the question whether a consul is immune from arrest for violation of an ordinance under such circumstances.

Consuls are generally considered to be commercial agents without diplomatic character and are not entitled to the privileges and immunities of public ministers. (3 C.J.S. 1; *In re Iasigi*, (1867) 79 F. 751, 752; *Savic v. City of New York*, (1922) 196 N.Y.S. 442, 445.

However, as representative of a foreign nation the consul and his consulate are entitled to special protection by the government to which he is accredited so that there may be no interference with the performance of his official duties. In his personal conduct and private capacity he is subject to the laws of the place of his residence and may be arrested and imprisoned for criminal offenses.

This subject matter may be covered by treaty or consular convention. It is reported as of the year 1936 that the arrangement between this country and Switzerland was that in case a consul commits an offense against the laws, the offended government may, according to circumstances withdraw his exequatur, send him away from the country, or have him punished in conformity with the laws, assigning to the other government its reasons for so doing. The Department of State or the Attorney General of the United States should, if necessary, be consulted regarding the provisions of any existing treaty or consular convention.

It is the opinion of a competent authority that as a matter of comity immediate arrest of a foreign consul charged with a criminal offense should be resorted to only when necessary to prevent further violation of

the laws or when there is ground for believing that the consul will use his freedom to flee from jurisdiction. (Stewart, *Consular Privileges and Immunities*, (1926) p. 157.) That observation is particularly applicable to the instant case in which the consul is charged with violation of a city ordinance. The offense is punishable by fine only and the arrest in such case is made to assure the presence of the defendant to answer the charge which is made in the name of the City of Chicago. This is clearly a civil action against the consul to recover the penalty imposed by ordinance. The action might as well have been instituted by complaint and summons. (*City of Chicago v. Williams*, (1912) 254 Ill. 360; *Village of New Athens v. Casperson*, (1918) 202 Ill. App. 553, 556.)

In any event, The Municipal Court of Chicago has no jurisdiction in any case, civil or criminal, in which a foreign consul is defendant. By the second clause of Section 2 of Article III of the United States Constitution the Federal courts have jurisdiction in all cases affecting ambassadors, public ministers and consuls and by Section 256 of the Judicial Code (U.S.C.A. Title 28, Sec. 371) the jurisdiction vested in the courts of the United States in these cases is made exclusive of the courts of the several States. It, therefore, becomes the duty of the Municipal Court to dismiss the case for want of jurisdiction. (See *Maron v. Lippert* (1941) 177 Misc. N.Y. 139.)

If moral turpitude is involved and the nature of the case warrants the State Department should be notified for such action as may be deemed advisable to preserve the friendly relations between the governments of Switzerland and the United States.

STATE FINANCIAL RESPONSIBILITY ACT

(No. 10874—*Commissioner Streets and Electricity—M. H. F.—December 10, 1945.*)

The State Financial Responsibility Act has no bearing on vehicles owned by the City of Chicago, as all vehicles owned by any municipality are expressly exempted from the act.

Citation: IRS '45, ch. 95½, secs. 42-12, 42-14, pars. 58 a to 58 m.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date invites attention to the Safety Financial Responsibility Act which becomes effective on January 1, 1946, and our opinion is requested with reference to the responsibility of motor truck drivers assigned to the operation of vehicles for the City of Chicago.

The act referred to consists of amendments to the State Motor Vehicle Law and may be found as sections 42-12 to 42-14 inclusive, paragraphs 58a to 58m inclusive, of Chapter 95½, Illinois Revised Statutes 1945.

It requires the operator or owner of every motor vehicle involved in an accident where damage exceeds \$50.00 to report the accident to the State Department of Public Works and Buildings within ten days; provides that the owner or operator must either furnish bond to cover the damages or furnish proof of financial responsibility or prove that he was

covered by insurance or proper bond; and where financial responsibility is not shown, provides for the suspension of an operator's license and car registration until (1) one year shall have elapsed following the date of such accident and satisfactory evidence is filed showing no action for damages arising out of the accident has been instituted, (2) he has settled or paid the claims against him, or (3) until he has been found not guilty.

Section 42-14 specifically provides as follows:

"Sections 42-1 to 42-13 of this Act shall not apply with respect to any motor vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein."

Sections 42-1 to 42-13 comprise the entire act with the exception of the section above quoted.

In view of this specific exception of motor vehicles owned by any municipality in the State, our opinion is that the act has no bearing upon motor vehicles owned by the City of Chicago and operated by drivers of your department in the employ of the city. The law applicable to the City of Chicago as an owner of motor vehicles and the responsibilities of its drivers who operate city motor vehicles, remains as it existed prior to the enactment of the Act and has not been affected thereby.

WEIGHT CERTIFICATE

(No. 10914—*M. H. F.*—September 26, 1946.)

The City of Chicago cannot accept, or recognize weight certificates issued by Arlington Heights weighmasters.

Citation:

Ordinance: Municipal Code, 100-19, 164.

OPINION OF FOREGOING SYNOPSIS

Your letter of September 19, 1946, addressed to the Mayor, has been referred to this department for reply.

Section 100-19 of the Municipal Code of Chicago provides that commodities, produce or other articles of merchandise sold in load lots by weight and delivered by vehicle within the city shall be weighed by a public weighmaster and that a certificate of weight for each load shall be delivered by the driver or person in charge of the vehicle to the person or consignee of the load at the time of delivery. Public weighmasters are required to be licensed under Chapter 164 of the Code and to furnish bonds in favor of the city conditioned for the faithful performance of their duties. These code provisions are designed to protect Chicago purchasers of load lots in the matter of correct weights. Their validity has been upheld by the Supreme Court of Illinois and the Supreme Court of the United States.

As no basis is found in the Code for the making of reciprocity agreements which would obviate the necessity of nonresidents and haulers of load lots from outlying districts, it is not seen how Chicago's Weights and Measures department could recognize weight certificates issued by

Arlington Heights weighmasters. Furthermore it would be impracticable for any City of Chicago Inspector of Weights and Measures to follow load lots of commodities originating in the vicinity of Arlington Heights and intended for delivery in Chicago. To adequately protect Chicago purchasers of load lots it is frequently necessary that a Deputy Inspector of Weights and Measures keep a particular load in view from the location of the scale upon which it was weighed to the point of delivery.



SECTION II

POLICE POWERS OF THE CITY

CHAPTER V — REGULATION OF PUBLIC HEALTH, SAFETY AND WELFARE

A. FOODS AND COSMETICS

PLANT RESTAURANTS

(No. 11049—City Collector—M. H. F.—April 19, 1948.)

Where a manufacturing concern operates four cafeterias within the confines of its plant, serving employees of the plant exclusively, such concern will require only one City of Chicago Retail Food Dispenser's License.

Citation: Municipal Code, 130-18.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date quotes a letter received by you from the Operations Supervisor for a caterer, with reference to the amount of the license fee payable under the city's Retail Food Establishments license ordinance for the privilege of operating industrial cafeterias in a Chicago manufacturing plant. Our opinion is requested.

It appears that the caterer operates four cafeterias and ten factory food wagons in connection with the above mentioned plant under contract with the company and that a license investigator from your office has informed the supervisor that four separate licenses should be procured for the establishment and four separate license fees paid, each based upon the number of persons engaged in each.

Section 130-18, the fee section of the Retail Food Dispenser's ordinance provides that where the general public is not served on the licensed premises, the annual license fee shall be graded upon the basis of the number of persons engaged in the plant or establishment wherein the food dispenser's establishment is maintained. The ordinance does not specifically require a separate license for each separate cafeteria or location in a plant where food is served. If then, the plant is one plant or establishment, though containing therein plural eating places or cafeterias, our opinion is that one food dispenser's license will suffice, and that the annual license fee should be computed upon the basis of the total number of persons engaged in the plant as a whole. If, however, the company maintains other plants or establishments at other locations within the city wherein food is dispensed at retail then in our opinion a separate license would be required for each location.

B. LIQUOR

LIQUOR LICENSE

(No. 10894—Chairman, Committee on License—M. H. F.—March 28, 1946.)

An ordinance allotting a maximum number of liquor licenses to a particular territorial area would be invalid as imposing restrictions not authorized by the State Liquor Control Law.

Citations:

Statute: IRS '45, ch. 43, arts. IV, VI, secs. 1, 2, 8, 8a, and 21 (Liquor Control Law).

Laws of Illinois, 1941, Vol. 1, p. 28.

Cases: 362 Ill. 80.
363 Ill. 628.
382 Ill. 445.
316 Ill. App. 635.
322 Ill. App. 485.

OPINION OF FOREGOING SYNOPSIS

Your communication of March 22, 1946 transmits a copy of a resolution adopted May 9, 1945 by the Uptown Clark Street Business Association requesting that appropriate action be taken to limit the number of retail liquor licenses in the community represented by the association. The resolution recites that the area from 5000 to 5500 N. Clark Street already has thirty-one licensed liquor establishments, and the claim is made that this is a sufficient number. Our opinion is sought as to the power of the city council to take the action requested in the resolution.

By section 1 of article IV of the Illinois Liquor Control Law, chapter 43, Illinois Revised Statutes, 1945, the city council is given express power by general ordinance to determine the number, kind and classification of licenses, for sale at retail of alcoholic liquor not inconsistent with the act, to be issued in the city, and to establish such further regulations and restrictions upon the issuance of and operation under local licenses not inconsistent with law as the public good and convenience may require, provided, that in the exercise of the powers granted in the section, the issuance of such licenses shall not be prohibited except for reasons specifically enumerated in sections 2, 8, 8a and 21 of article VI of the act.

The restrictions contained in the proviso were added by an amendment made July 11, 1941 (Laws of Illinois, 1941, Volume 1, Page 28). The sections of article VI specifically mentioned in the proviso are section 2, which has to do with the qualifications of applicants for license; section 8, which prohibits the issuance of licenses for premises within one hundred feet of churches and other protected institutions; section 8a, which prohibits the issuance of licenses to school stores; and section 21, which provides that no person shall receive a local license to sell alcoholic liquor upon any premises as a restaurant nor as a club unless it has the qualifications respectively described in subsections 16 and 17 of section 2, article I, and further provides that no restaurant licensed as such shall sell alcoholic liquor except with meals. No one of these sections referred to has any

direct bearing upon the matter of limiting by ordinance the number of licenses.

Inasmuch, therefore, as the legislature has conferred upon the city council express power to determine the number of retail licenses to be issued in the city our opinion is that the only effect of the restrictions contained in the above mentioned proviso is to restrict prohibitions against the issuance of the number of licenses established by the city council in its limiting ordinance to 2, 8, 8a and 21 of article VI. In other words our thought is that the city council may limit the total number of licenses but when the city issues that number it may not refuse issuance except for reasons specifically enumerated in sections 2, 8, 8a and 21 of article VI.

The limitation of the total number of licenses to be issued in the city is not, however, the action requested in the resolution. What the association evidently wants is action to limit the number of licenses in the Uptown Clark street district only. Such action we do not believe the city council is authorized to take. While in determining the total number to be issued it may doubtless fix a certain maximum number or a number based upon population, such as one license to every so many inhabitants, our opinion is that to fix a maximum number which may be issued in a particular neighborhood would render the ordinance unlawfully discriminatory and would be violative of the state act which confers no authority to allocate licenses and which provides the procedure to be followed in case the legal voters of a precinct or group of precincts do not desire retail establishments therein. In other words were the city council to limit the number of licenses within a particular designated area it would in our judgment be imposing further and additional restrictions to those authorized by the state act.

In *Walgreen Co. v. Lenane* (1936) 363 Ill. 628, the court held invalid as contravening the statute the ordinance of the city of Quincy which provided that no corporation should receive a license to sell liquor in that city unless the corporation had its home office therein or a majority of its stockholders lived there. The court condemned the ordinance because it imposed a regulation that was not a part of the powers granted to cities by the act.

See also to the same effect *Retail Liquor Dealers Association v. Schrieber* (1943) 382 Ill. 445; *City of Fairfield v. Pappas* (1935) 362 Ill. 80; *Walgreen Co. v. Garland* (1942) 316 Ill. App. 635; *Apperson v. Hartford Accident and Indemnity Co.*, 322 Ill. App. 485.

As the city's power is a delegated authority and even though liberally construed, is no broader than the power and authority delegated by the state act, our conclusion is that an ordinance which allocated to a particular territorial area a maximum number of licenses would be invalid as imposing restrictions not authorized by the state act.

LIQUOR LICENSE FOR CLUBS

(No. 10987—Commissioner of Police—M. H. F.—August 15, 1947.)

A private club dispensing liquor without profit and to its members only must still obtain a City Retailers Alcoholic Liquor License.

Citations:

- Statute: IRS '43, Art. II, Sec. 1 (Ill. Liquor Control Act).
- Ordinance: Municipal Code, Ch. 147.
- Cases: 203 Ill. 127.
228 Ill. 75.

OPINION OF FOREGOING SYNOPSIS

Your communication of August 6, 1947 transmits a copy of a report of the Commanding Officer of the Sixth Police District regarding the sale of alcoholic liquor without City license by a private club, and you request our opinion as to whether the club is required to procure a City Retailer's Alcoholic Liquor license.

The Illinois Liquor Control Act, Chapter 43, Illinois Revised Statutes, is the paramount law, controlling upon the matter. Subject to certain exceptions not material to your inquiry, Section 1 of Article II provides that no person shall sell, barter, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this Act. The words "except as specifically provided in this Act" mean except under license or licenses provided for in the Act and in the manner set forth in the Act.

By Article IV of the Act the City Council is authorized by general ordinance to license retailers, and Chicago's Ordinance, entitled Liquor Dealers, Chapter 147 of the Municipal Code of Chicago, has been enacted as an exercise of the power conferred by statute.

Generally speaking, no person may sell alcoholic liquor in Chicago at retail for beverage purposes except under both City and State retailer's licenses. A retailer means a person who sells, or offers for sale, alcoholic liquor for use or consumption and not for resale in any form.

That the word person includes a club is made certain by express provisions contained in the Act, which provisions relate to clubs. Section 1 (17) of Article I defines the word club as follows:

"The word 'club' means a corporation organized under the laws of this State, not for pecuniary profit, solely for the promotion of some common object other than the sale or consumption of alcoholic liquors, kept, used and maintained by its members through the payment of annual dues, and owning, hiring or leasing a building or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests and provided with suitable and adequate kitchen and dining room space and equipment and maintaining a sufficient number of servants and employees for cooking, preparing and serving food and meals for its members and their guests; provided, that such club files with the Local Commission at the time of its application for a license under this Act two copies of a list of names and residences of its members, and similarly files within ten (10) days of the election of any additional member his name and address; and, provided further, that its affairs and management are conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting, and that no member or any officer, agent, or employee of the club is paid, or directly or indirectly receives, in the form of salary or other compensation any profits from the distribution or sale of alcoholic liquor to the club or the members of the club or its guests introduced by members beyond the amount of such salary as may be fixed and voted at any annual meeting by the members or by its board of directors or other governing body out of the general revenue of the club."

Section 8 of Article VI specifically refers to the issuance of retail licenses to regularly organized clubs in connection with the prohibition of licenses for premises within 100 feet of churches, schools, hospitals and other protected institutions.

Section 9 of Article VI also refers to clubs in connection with the sale of alcoholic liquor at retail in certain buildings having access to dwelling or lodging premises.

Section 13 of Article VI removes club licenses from the prohibition against the sale of alcoholic liquor on credit by a proviso authorizing clubs to permit members and bona fide guests of members to sign checks and to charge the accounts of such members or guests in accordance with the by-laws of the clubs.

Section 20 of the same Article exempts clubs from the clear view provisions of the Act.

Section 21 of the same Article provides that no person shall receive a local license to sell alcoholic liquor upon any premises as a club unless it has the qualifications described in Sub-section (17) of Section 2, Article I.

Section 1 (1) of Article VII requires a club applicant for license to state in its application the date of the club's incorporation, the objects for which it was organized, the names and addresses of its officers and directors, etc.

Section 1 (12) of Article VII also relates to applications made in behalf of clubs and prescribes how they shall be signed and sworn to.

It will therefore be seen that the State law expressly provides for the licensing of clubs and prohibits the sale at retail of alcoholic liquor by any club except it be duly licensed.

The City's Liquor Dealers Ordinance, Chapter 147, Municipal Code of Chicago, is superimposed upon the State Act, and adopts the definitions of the State Act. It prohibits every person from selling at retail any alcoholic liquor within the City without first procuring a City license. It makes specific reference to regularly organized clubs as persons subject to license. (Sections 147-9 and 147-16.1.)

So far as we know, all regularly organized Chicago clubs dispensing alcoholic liquor are licensed or subject to license under both the State Act and the City's Ordinance.

The contention made by the club in question, said to be on the advice of attorneys, to the effect that inasmuch as the club is not open to the general public, it is not necessary for it to procure a City license, is not sustainable, but patently unsound. Some years ago the same contention was made and decisively disposed of by the Supreme Court of Illinois in the case of *South Shore Country Club v. The People* (1907), 228 Ill. 75. The court held that a social club, incorporated or unincorporated, open only to members and their guests and not to the general public, which dispenses intoxicating liquor to members, even though no profit is made, is within the meaning of the Dram-Shop Act, notwithstanding the club is organized in good faith for social purposes, and not as a mere device to evade the statute requiring a dram shop license to be obtained. To the same effect *The People v. Low and Order Club* (1903), 203 Ill. 127.

Our opinion therefore is that the club mentioned in your communication may not lawfully dispense alcoholic liquor at retail to its members or guests without first procuring a City Retail Liquor Dealers license.

Whether the club is a bona fide club within the meaning of the term "club" as defined in the Liquor Control Act, will be developed when it files and its application for license is investigated by your department.

Should the club persist in its efforts to dispense alcoholic liquor without the necessary license your attention is invited to Section 147-17 of the City's Liquor Dealers Ordinance, also to the penalty article (Article X) of the State Liquor Control Act.

DAY NURSERY NEXT TO TAVERN

(No. 10994—Mayor's Office—M. H. F.—September 9, 1947.)

An otherwise duly qualified applicant may obtain a City Retailer's Alcoholic Liquor License for premises next to a building housing a day nursery. A day nursery, under the Liquor Control Law, is not defined nor by interpretation can it be held to be a school, therefore the prohibition against operating a tavern within 100 feet of any school does not apply.

Citations:

Statute: Art. VI, Sec. 8, Illinois Liquor Control Law.
Ordinance: Municipal Code, 158.

OPINION OF FOREGOING SYNOPSIS

Your memorandum note of September 8, 1947 transmits an application for a city's retailer's alcoholic liquor license for premises on the first floor of a building located at 2118 W. Chicago Avenue, together with an accompanying file of documents relative to the application. Our opinion is requested as to whether or not the license applied for may be granted.

The applicant states in his application that the premises for which he seeks a license are not within 100 feet of a school. The police department report, endorsed on the application, states that the "location is more than 200 feet from a church, or hospital, but is adjoining to a day nursery. The file shows that officers of the Creche are objecting to the issuance of the license because of the proximity of the proposed liquor premises immediately adjoining the premises of the Creche. The matter for decision, therefore, appears to be whether the Creche is entitled to the protection of section 8 of Article VI of the Illinois Liquor Control law, which section provides that no license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any school and certain other institutions therein mentioned in the section.

When passing the Liquor Control Law the legislature did not define the word "school", so we are required to give to the word its common, accepted meaning. This we have always understood to be a public or parochial grade school, not including institutions of higher learning or trade schools.

The letterhead of the day nursery states that its institution is a "Day Nursery", and its letter of protest says that its charter purpose is "to maintain a Day Nursery, to assist working women in the care and education of their children." it is said that the nursery is licensed under the city's Day Nurseries ordinance, chapter 158 of the Municipal Code of Chicago. The letter also speaks of its "Nursery School" and states that it operates "a school administering to the needs of 100 children." When interviewed, the attorney for the nursery stated that approximately 100 children are cared for whose parents are unable to do so during the day and that about 50 of the children, who are over 6 years of age, are taken to parochial or public schools for their schooling, and those under 6 years receive kindergarten training at the nursery. It further appears that there has been for a number of years a retail liquor establishment at 2118 W. Chicago Avenue, which establishment was there when the nursery moved into the premises adjoining at 2116 W. Chicago Avenue, and that recently the owner of the building evicted a liquor licensee tenant

and that the owner now seeks a license in his own name. When the manager of the nursery was interviewed she is reported to have stated that her institution did not complain of the liquor business occupancy next door, but that its Board of Directors was now opposed to a new applicant opening at the address.

It seems obvious that had the legislature intended to bring Day Nurseries with the protective provisions of section 8 of Article VI of the Liquor Control law, it would have employed the words "Day Nursery", and that it would be an unwarranted interpretation of the word "school" to say that a Day Nursery was a school within the intent and meaning of the word school as used by the legislature.

Our understanding of the word "kindergarten" is an institution for the care of children too young to enter regular schools. While the matter may not be entirely free from doubt our opinion is that when enacting the Liquor Control Law it was not the intention of the legislature to include a kindergarten within the meaning of the word "school". Therefore, when it is observed that the children over 6 years of age, under the care of the nursery, are taken to parochial or public schools for their schooling, our opinion is that the nursery is not entitled to the protection of section 3, and that if the present applicant for a liquor license is qualified and he and his premises meet all of the other requirement of the state law and the city ordinances, it would not be proper to refuse him a license.

If the conclusion herein reached is not acceptable to the nursery, and a license should be granted, the Liquor Control Law affords the nursery an opportunity to appeal to the License Appeal Commission and to the courts and obtain a review of the granting authority's decision.

C. WEAPONS

TEAR GAS FOUNTAIN PENS

(No. 10964—Commissioner of Police—M. H. F.—May 14, 1947.)

The purchase and sale of the fountain pen type of tear gas weapon is unlawful except under license, police permit and regulation as provided for in the Municipal Code.

Citations:

Ordinance: Municipal Code, 183-10, 183-11 to 183-18.

Other reference: 18 Op. Corp. Coun. 434.

OPINION OF FOREGOING SYNOPSIS

Your communication of May 13, 1947 quotes from a letter received by you from a Chicago dealer in firearms, in which it is said that a tear gas weapon in the shape of a fountain pen is again on the market. The dealer inquires whether the sale of the article would violate any provision of the Municipal Code.

During the years 1929 and 1930 attempts were made to sell promiscuously within the city fountain pen types of tear gas weapons. Samples

were submitted to your department and to us for examination, and in an opinion rendered the Commissioner of Police March 12, 1930 (Opinions of the Corporation Counsel, Volume XVIII, p. 434), we expressed the view that the contraption was an article in the nature of a firearm in which an explosive substance could be used and was in fact used, and that the sale and display of the article might be restricted under Section 1265 of the Chicago Municipal Code of 1922, as amended. A copy of the opinion is transmitted herewith.

The section of the Municipal Code of Chicago corresponding to Section 1265 of the Chicago Municipal Code of 1922, is 183-10 which reads as follows:

183-10. License required.) It shall be unlawful for any person to engage in the business of selling, or to sell or give away any air rifle or air gun, or any toy firearms or other toy in the nature of a firearm in which any explosive substance can be used without securing a license so to do, and no person having secured such license shall sell, or give away any such weapon to any person within the city who has not secured a permit from the commissioner of police to purchase such weapon in the manner hereinafter provided; provided, that it shall not be necessary for any person licensed to sell deadly weapons to take out an additional license for the sale of the articles mentioned herein.

Sections 183-11 to 183-18, inclusive, cover the matters of application for license, report of sales to Commissioner of Police, police permit to purchase, restrictions on issuance of permit, prohibition of display, revocation of license, and penalty for violation of the ordinance.

Adhering to the views expressed in the above mentioned opinion and advising you with reference to the present ordinance provisions, our opinion is that the purchase and sale of the fountain pen type of tear gas weapon is unlawful except under license, police permit and regulation as provided for in the above mentioned sections of the Municipal Code of Chicago, and that the display thereof in show windows, etc. is prohibited by Section 183-16.

AIR RIFLES

(No. 11058—Commissioner of Police—M. H. F.—May 27, 1948.)

A Chicago Corporation is not required to be licensed under the Municipal Code to sell at wholesale air rifles to Chicago retail dealers. The dealers, however, are subject to license.

Citation: Municipal Code, 183-10, 193-13, 183-14, 183-16.

Reference: 18 Op. Corp. Coun. 433.

OPINION OF FOREGOING SYNOPSIS

Your communication of May 30, 1948 states that a Chicago company is contemplating submitting application for license for the sale of air rifles to its dealers and stores on a wholesale basis only, and that the company is asking for an opinion regarding its sales so far as they may pertain to city code provisions requiring sales may be made only to permit holders. Inas-

much as the company states its sales will be strictly wholesale to dealers and stores in Chicago, it wishes advice as to whether the permit provision will apply. You request our opinion upon the matter.

The provisions of chapter 183 of the Municipal Code of Chicago have a bearing upon the subject matter of the inquiry.

Section 183-10 provides as follows:

183-10. License required.) It shall be unlawful for any person to engage in the business of selling, or to sell or give away any air rifle or air gun, or any toy firearms or other toy in the nature of a firearm in which any explosive substance can be used without securing a license so to do, and no person having secured such license shall sell, or give away any such weapon to any person within the city who has not secured a permit from the commissioner of police to purchase such weapon in the manner hereinafter provided; provided, that it shall not be necessary for any person licensed to sell deadly weapons to take out an additional license for the sale of the articles mentioned herein.

Other sections relate to reports of sales to be made by licensees to the Commissioner of Police (183-13), prohibits displays of air rifles and toy weapons (183-16), and prescribe that it shall be unlawful for any person to purchase any air rifle or air gun without first securing from the Commissioner of Police a permit so to do (183-14.) The fee for such permit is fixed at \$1.10, and no permit may be issued to any person who has been convicted of any crime, or to a minor.

In an opinion rendered the Superintendent of the Department of License, January 3, 1930, Opinions of the Corporation Counsel, Vol. XVIII, page 433, we expressed the view that section 1265 of the Chicago Code of 1922, which section is substantially the same as section 183-10 of the present code, was applicable only to retail dealers. Study of the other sections of the ordinance which relate to reports of sales to the Commissioner of Police, and issuance of purchase permits to individuals, support this view.

Our opinion therefore is that the company in question is not required to be licensed under chapter 183 of the Municipal Code in order to sell at wholesale air rifles to Chicago retail dealers. Should it make any sale at retail it would, however, be subject to license. The Chicago dealers, to whom the company makes sales of air rifles would of course be subject to license under the ordinance and should be held strictly to its regulatory provisions.

TELEVISION PROGRAMS

(No. 11094—M. H. F.—December 14, 1948.)

The City of Chicago has no power to regulate or control the character of programs presented on television channels within the City.

Citations:

Statute: Communications Act of 1934.
Case: 46 Fed. (2d) 671.

OPINION OF FOREGOING SYNOPSIS

Last month Mayor Kennelly referred to this department your letter of November 12, 1948, relative to the matter of regulation by the city of television programs disgusting in character which are presently being put on television screens in Chicago.

Being in accord with you as to the need of regulation we have given the matter study and regret to say that so far we are unable to reach a determination that the city possesses authority by ordinance to exercise supervision or surveillance over the programs, this because of the close linking of television with radio and the holdings of the courts to the effect that municipal regulation would be an unlawful interference with interstate commerce. The Radio Act of 1927 empowered the Federal Radio Commission and its successor the Federal Communications Commission, to regulate "all forms of interstate and foreign radio transmissions and communications within the United States." Section 31 defines the term "radio communication" to mean "any intelligence, message, signal, power, pictures or communication of any nature transferred by electrical energy
* * *."

Furthermore the Communications Act of 1934 is still more explicit with reference to the Commission's jurisdiction over television. Section 3 (b) defines "radio communication" as the transmission by radio of "writing, signs, signals, pictures and sounds of all kinds."

Our investigation shows that it has been held in the case of *Station WBT v. Poulnot*, 46 F. (2d) 671, that radio broadcasting stations are engaged in interstate commerce and that state laws imposing license taxes on radio receiving sets are unconstitutional as imposing a burden on interstate commerce. The court in his opinion stated that such a license tax could not be sustained as a matter of local regulation, for the subject is national, and admits only of one uniform system or plan of regulation, and that it could not be sustained as a police regulation with an incidental tax to pay the expense of the regulation, as it has no elements of police.

D. GAMBLING AND LOTTERIES

PROPOSED JINGLE CONTEST

(No. 10971—Commissioner of Police—M. H. F.—June 14, 1947.)

The scheme called "Theater Jingle Contest", would be violative of the public policy, and statutory law of Illinois prohibiting lotteries. Any Chicago theater, which conducted the contest in connection with its performance would thereby subject itself to a revocation of its license.

Citation: IRS '45, Ch. 24, 23-57. Ch. 38, pars. 406, 408, 409.

Cases: 40 Ill. 465.
349 Ill. 270.
366 Ill. 256.
179 N.Y. 164.
341 Mo. 862.

Reference: 17 RCL 1225.

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date requests our opinion as to the legality of a so-called "Theatre Jingle Contest", originated by a film company of Hollywood, California. With the letter you forward (1) a form of contract designed for execution between the film company and motion picture theatres who are willing to exhibit the company's films and conduct the contests, (2) a short statement in explanation of the contest, and (3) a copy of a report made by your Crime Prevention Division relating to the scheme and telling of the recent visit to Chicago of the vice-president of the film company.

While in the city he called at this office to discuss the legality of the scheme and when it developed that he sought a formal opinion we advised him that his method of approach was through your department, as this office does not make a practice of rendering legal opinions to members of the general public. We suggested that he make to you a full disclosure of the facts so that when the matter came to us we might decide the legal question based upon the factual statement.

From the documents submitted and what we remember of the executive's conversation with us, it would appear that the jingle contest consists of the production and exhibiting in motion picture theatres of a series of animated cartoon films, advertising in a progressive fashion the product of some manufacturer sponsoring the series. Each series comprises four separate one-minute movies, one of which is to be run each week. Three of them, each different, announce the coming of the contest. The contest movie is to be run the fourth week. A so-called "pay-off trailer" is to be shown at a period commencing not later than five weeks after completion of the contract. The fifth week after the contest is to be the pay-off week. The film company agrees to pay the exhibitor theatre a sum of money to be agreed upon, per 1,000 patrons attending the theatre during the showing of the four one-minute movies,

and it is authorized to audit the theatre's attendance reports. It is said that a minimum of three and a maximum of thirteen contests will be held annually.

The contract with a theatre is for a five year period and is exclusive only as to other national contests of a similar nature, as all of the minute movies and trailers are to run simultaneously throughout the United States in all contracting theatres. It is estimated that contests will be conducted in from 10,000 to 12,000 theatres throughout the United States.

\$100,000.00 is to be paid in cash to the contest winners, with \$50,000.00 as the first prize; the balance will be split up into twenty-five or more other winners ranging from \$20,000.00 to \$50.00.

To win a prize a theatre patron (who we understand will be one of the many thousands of patrons of from 10,000 to 12,000 theatres) must send in a jingle relating to the sponsor or his product. All persons in the United States, its territories and possessions, may enter, except employees of the film company, the sponsor, the theatres involved and advertising agencies and their families. The theatre patron mails in his jingle to a central point, where allegedly disinterested persons supposedly tabulate and decide the winners. Decisions of the judges are final and all jingles become the property of the film company. It is said that contestants are not required to buy any of the sponsor's products nor necessarily to be present at the theatre where winners are announced, to claim their prizes.

Based upon the above stated facts the question for our decision appears to be whether or not the contest is a lottery or gift enterprise within the prohibition of the Illinois Lottery Laws, or a chance distribution of money which licensed Chicago theatres may not conduct in connection with their performances.

The conducting of lotteries or gift enterprises is contrary to the public policy of the State of Illinois. By section 27 of Article IV of the Illinois Constitution of 1870, it is provided that the General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprises in this State.

Paragraph 406 of the Criminal Code, Chapter 38, Illinois Revised Statutes, 1945, makes it a criminal offense to set up or promote any lottery for money, or by way of lottery to dispose of any property of value. Paragraph 407 makes punishable the owner or occupant of every house or building who knowingly permits the setting up, managing or drawing of a lottery, or knowingly suffers money or other property to be raffled for, or to be won there by any game of chance. The selling of lottery tickets is prohibited by paragraph 408. Paragraph 409 makes unlawful the advertising of any lottery ticket or scheme. By paragraph 411 all sums of money or other valuable thing drawn as a prize in any lottery are forfeitable to the state, and may be recovered by information filed, or other appropriate civil action, brought by the Attorney General, or the State's Attorney in the proper county.

By Section 23-57 of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, municipalities in Illinois are granted express power "to suppress gaming, gambling houses, lotteries, and all fraudulent devices or practices for the purpose of gaining money or property."

Exercising the power conferred upon it the City Council of the City of Chicago enacted in Chapter 191 of the Municipal Code of Chicago provisions prohibiting gambling, lottery and policy games, and also in Chapter 104 of the Code, relating to Amusements, provided in Section 104-9 that every amusement license shall contain a proviso that "no gaming, raffle, lottery, or chance distribution of money, gift or article of value shall be

connected therewith or allowed by the person obtaining such license, or in any wise permitted to be held out as an inducement to visitors."

The courts of Illinois have often passed upon lottery schemes and gift enterprises. In *Dunn v. People* (1866), 40 Ill. 465, the Supreme Court said that the word "lottery" has no technical meaning in the law distinct from its popular signification, which is a scheme for the distribution of prizes by chance. In *People v. Monroe* (1932), 349 Ill. 270, the court accepted Webster's definition, "a scheme for the distribution of prizes by lot or chance," as being sufficient for the purpose of that case. In the more recent case of *Iris Amusement Corporation v. Kelly* (1937), 366 Ill. 256, the court stated that a lottery may be defined as a scheme for the distribution of prizes by lot or chance, and that it consists of three essential elements,—a chance, a prize, and a price.

The decision in the *Iris Amusement Corporation* case is especially helpful to the matter now being considered as it upheld the validity of Chicago's ordinance above mentioned. A prize money distribution scheme of motion picture theatres, known as "Bank Night" was examined and held to constitute a lottery and to violate the City's ordinance. The Amusement Corporation admitted the existence of the elements of "chance" and "prize", but contended that its "Bank Night" scheme was not a lottery as the third essential element "price", was lacking since persons not attending the theatre and who never paid any admission fee had a chance to win. The court, however, held that a scheme does not cease to be a lottery because some, or even many, do not have to pay to participate, saying (p. 266):

"In actual operation those who paid to get in, paid for those on the outside in so far as those on the outside had a chance to win, and the giving of free chances to those who did not come in could not alter the basic and essential character of the transaction. * * *

In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its chance for a large prize, which may become large enough to arouse intense cupidity; there is the excitement of drawing a lucky number with its attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus created cupidity, envy, jealousy and temptation—the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries."

Then in concluding its opinion the court said (p. 268):

"Our public policy against lotteries expressed in two constitutions, in the Criminal Code, and in the ordinance before us, is much too firmly rooted to be evaded by any chimerical device. Our conclusion is that the operation of the scheme outlined in the amended complaint constitutes a lottery and that the plaintiffs have no standing in a court of equity for its furtherance or protection."

We have quoted these portions of the opinion in the *Iris Amusement Corporation* case as an answer to the point made by the film company that it is not necessary for a contestant to be present in the theatre when the winners are announced, to claim his prize. It is not, however, our understanding that the film company seriously denies that two of the essential elements of a lottery or chance distribution of money are present in their scheme, i. e. those of prize and price. Obviously, the distribution of \$100,000.00 in prize money to whet the gambling appetites

of theatre patrons, arouse intense cupidity, and swell the box office receipts of the theatre, supplies the "prize" element. Manifestly, the price paid for an admission ticket to the theatre supplies the "price" factor.

With two of the essential elements present in the contest is then the third element of "chance" to be found in the scheme? We think it is.

True, the sending in of a jingle is a prerequisite to the winning of a prize, and it may be argued that to write a jingle requires the exercise of some skill or judgment. But when we look at the practical aspects of the matter and remember that a contestant for a prize is only one of many thousands of patrons of some 10,000 to 12,000 theatres in the United States, that the decision of the judges of the contest is final, and that the task of their reading and actually judging the combined poetic genius and advertising features of all the jingles sent in would be so Herculean as to be impossible of performance, must we be so gullible as to concede that the dominating element is not chance.

In 17 Rulling Case Law, page 1225, Section 12 of the article on Lotteries, it is stated:

"* * * from an examination of the later cases, both federal and state, it appears to have become the established American doctrine that, in order to constitute a lottery within the meaning of the various statutes, it is not necessary for the distribution of prizes to be purely by chance, but only for such distribution to be by chance as the dominating element, even though affected to some extent by the exercise of skill or judgment."

In *Pople ex rel Ellison v. Lavin* (1904), 179 N. Y. 164, 66 L.R.A. 601, in condemning as a lottery a scheme for the distribution of prizes to those who make the closest estimate of the number of cigars on which a tax is paid during a specified period, the court said (p. 170):

"Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by players, * * *. The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating elements that determines the result of the game. * * *

If we examine the plan of distribution advertised, the number and character of the persons who were invited to compete for the distribution as well as the event by which the distribution was to be determined, we think it perfectly clear that the dominating and controlling factor in the award of the prizes is chance. * * * If the contest for a prize was to be had among experts, the award of the prize, despite the many elements affecting the result which no one could foresee, might be held dependent on judgment and not on chance. But the competition before us is not at all of that character. The scheme contemplates over thirty-five thousand competitors."

State v. Globe-Democrat Publishing Company (1937), 341 Mo. 862, 110 S. W. 705, involved a newspaper cartoon contest wherein contestants selected the most appropriate name from a suggested list, for a series of eighty-four cartoons. The court held the contest to be a lottery, even though skill, judgment or research entered thereinto in some degree. In its opinion the court said:

"Further, we are convinced the question whether the element of chance was present must be viewed from the standpoint of the nearly 70,000 persons who entered the contest in response to the advertising thereof; and that it is not to be measured by any absolute or technical standards."

While we have no means of accurately estimating the number of patrons of from 10,000 to 12,000 theatres that would be induced to send in jingles, the probabilities are that the number would be very large, considering the cash prizes offered.

The film company says the jingles are to be judged by a firm of judges on "aptness of thought, originality and sincerity." Either one of the three factors would cover such a wide and uncertain field as to mean, when all three factors were assembled, that the judgment would depend upon the whim of the judges and not upon their application of any well recognized standard. It would overtax credulity to say that the jingles, if examined at all, would be judged by "absolute or technical standards," when they were judged by a plural number of judges by some uncertain combination of "aptness of thought, originality and sincerity." These terms are rather vague, uncertain and elusive. What would be original to one judge might be commonplace to another. What would express the quality of being sincere to one might be pure hypocrisy to another. Does anyone know how these terms would be understood and applied by any single member of a judging committee or the committee as a whole? At best a contestant sending in a jingle would be required to guess how they would be interpreted and applied, if at all, by an unknown firm of judges. Even were we to concede the integrity of the judges and the fixing by them of some common ground of primacy, it seems nevertheless obvious that whatever ground of certainty is attained must be reached by an inescapable element of chance. But one conclusion, therefore is deducible and that is whether a theatre patron author of a jingle received a prize, would depend upon the predominant element of chance.

Not only would this contest tend to degrade motion picture performances by commercials (a matter not directly before us), but it would spread its corrupting influence upon thousands of our people by stimulating the virus of cupidity, avarice and disappointment.

A moment of rational reflection will reveal its evil in ghastly proportions. Chicago has some 313 motion picture theatres, with an aggregate seating capacity of 332,000, conducting from one to six performances daily. With each seat occupied twice daily a total daily attendance of 664,000 would be reached. Thus, in this city alone approximately that number of our inhabitants would have their gambling instincts aroused, their lust for illegitimate gain whetted, and in the end would suffer the depression and disappointment felt by character wrecks who dissipate their lives in the allurements of wheels of chance.

Multiplying this number by the figures given us that there will be from 10,000 to 12,000 theatres in the United States conducting the contest simultaneously, and that from three to thirteen series will be run each year, produces a total of evil staggering in proportions.

Credulity is taxed far beyond the breaking point when we are expected to believe that the scheme proposed escapes the condemnation of the Statute and the Municipal Code.

Our opinion, therefore, is that the scheme called the jingle contest would be violative of the public policy and statutory law of Illinois and that any Chicago theatre which conducted the contest in connection with its performances would thereby subject itself to the revocation of its license.

SLOT MACHINE MONEY

(No. 10977—Commissioner of Police—S. R. D.—June 26, 1947.)

Money found in slot machines seized by the Police Department forms an integral part of such gambling devices and is subject to confiscation.

Citations: 393 Ill. 568.
325 Ill. App. 554.

OPINION OF FOREGOING SYNOPSIS

We are pleased to report that on Thursday, June 26, 1947, the Appellate Court rendered its opinion in the above entitled cause reversing the judgment of the Trial Court for \$437.08 entered against the defendants and entered judgment in favor of said defendants.

This case was an action in detinue brought by a private club for the return of nine slot machines and \$437.08 found in said slot machines. In the Trial Court the plaintiff admitted that the slot machines in question were gambling devices and subject to seizure and confiscation, but demanded the return of the money found in the slot machines by the police officers.

It was our contention that under the cases of *Weiss, et al. v. James P. Allman, et al.*, 325 Ill. App. 554, and *City of Chicago v. Thomson*, 393 Ill. 568, the police had the right to seize the slot machines and that the money, being sealed and contained in the slot machines, formed an integral part of the illegal gambling operation and, therefore, was subject to seizure with the devices.

The Appellate Court upheld the contention of the defendants that the police officers had the right to seize the slot machines. The court stated that the particular question presented here for determination had never been considered and determined in the State of Illinois. The court held that the cases cited by the defendants from other jurisdictions were squarely applicable to the situation presented in the case at bar and that since the money found in the slot machines formed an integral part of the illegal gambling operation of such machines and since it never came into the possession of plaintiff, the latter did not become the owner of said money and it was therefore subject to seizure and confiscation along with the contrabrand slot machines.

NIGHT CLUB QUIZ SHOW

(No. 10986—Alderman 42nd Ward—M. H. F.—August 11, 1947.)

If the owner of a night club were to conduct a quiz show for cash prizes he would subject himself to a revocation of his amusement license.

Citations:

- Constitution: Art. IV, Sec. 27, Illinois Constitution 1870.
Statute: IRS '45, Ch. 24, 23-57. Ch. 38, pars. 406, 407, 409, 411.
Ordinance: Municipal Code, 104-9, 191.
Cases: 366 Ill. 256.
110 S.W. 705 (Mo.).
179 N.Y. 164.
250 Pac. 37 (Wash.).
39—C.—7759.
Other references: 20 Op. Corp. Coun. 91.
21 Op. Corp. Coun. 130, 132.
38 Corpus Juris 291.

OPINION OF FOREGOING SYNOPSIS

Your communication of August 1, 1947 states that the owner of a Chicago night club would like to conduct a quiz program in conjunction with his usual floor show and that the plan proposed is as follows: Each patron of the night club would be given a numbered ticket, without charge, upon entering the place. During the show various numbers would be selected by a drawing. The patrons whose numbers were drawn would then participate in an attempt to state the correct answers to certain proposed questions of general interest, questions said to be similar to those asked on the various quiz programs on the radio. Cash prizes would be offered. The claim is made that the scheme would not be a lottery because (1) the tickets are delivered to patrons free of charge and without consideration, and (2) because of the further alleged claim that the prizes are won by the skill of the participants without any element of chance.

You ask that we express to you our opinion concerning the legality of the proposed program.

While that part of the factual statement concerning the character of the questions propounded to those patrons drawing lucky numbers is vague, enough facts are given to convince us that the program or scheme would fall within the prohibition of the State lottery laws and also the provisions of the Municipal Code of Chicago prohibiting lotteries and gift enterprises.

The conducting of lotteries or gift enterprises is contrary to the public policy of the State of Illinois. By section 27 of Article IV of the Illinois Constitution of 1870, it is provided that the General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprises in this State.

Paragraph 406 of the Criminal Code, Chapter 38, Illinois Revised Statutes, 1945, makes it a criminal offense to set up or promote any lottery for money, or by way of lottery to dispose of any property of value. Paragraph 407 makes punishable the owner or occupant of every house or building who knowingly permits the setting up, managing or drawing of a lottery, or knowingly suffers money or other property to be raffled for, or to be won there by any game of chance. The selling of lottery tickets is prohibited by paragraph 408. Paragraph 409 makes unlawful the advertising of any lottery ticket or scheme. By paragraph 411 all sums of money or other valuable thing drawn as a prize in any lottery are forfeitable to the state, and may be recovered by information filed, or other appropriate civil action, brought by the Attorney General, or the State's Attorney in the proper county.

By Section 23-57 of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, municipalities in Illinois are granted express

power "to suppress gaming, gambling houses, lotteries, and all fraudulent devices or practices for the purpose of gaining money or property."

Exercising the power conferred upon it the City Council of the City of Chicago enacted in Chapter 191 of the Municipal Code of Chicago provisions prohibiting gambling, lottery and policy games, and also in Chapter 104 of the Code, relating to Amusements, provided in Section 104-9 that every amusement license shall contain a proviso that "no gaming, raffle, lottery, or chance distribution of money, gift or article of value shall be connected therewith or allowed by the person obtaining such license, or in any wise permitted to be held out as an inducement to visitors."

The courts of Illinois have often passed upon lottery schemes and gift enterprizes. In the case of *Iris Amusement Corporation v. Kelly* (1937), 366 Ill. 256, the Supreme Court stated that a lottery may be defined as a scheme for the distribution of prizes by lot or chance, and that it consists of three essential elements,—a chance, a prize, and a price.

In the scheme outlined in your letter the element of prize is admittedly present.

It is contended that the element of price is not involved because the numbered tickets are given to patrons of the night club free of charge. This contention hardly seems sustainable when consideration is given to the fact that the night club is a place of amusement and undoubtedly operated for pecuniary profit, and the purpose of the quiz program is designed as an added attraction or inducement to promote increased attendance, resulting in increased sales of food and drinks. So, while a patron may not pay directly for a ticket or chance to draw, the proprietor of the place receives the price or a money consideration indirectly when the patron pays for food and drinks served him or pays a cover charge for the right to frequent the place, view the floor show and participate in the quiz program. It is certain that the prize money will come from the pockets of those who patronize the night club and that without patrons there would be no prizes.

When examining schemes to determine whether there is an evasion of the statute or avoidance of an ordinance, the test is not the mere theoretical possibilities of the scheme, but its actual practical operation. The adjudicated cases on the subject are very numerous and the courts have shown a general disposition to bring within the term "lottery" every species of gaming involving a distribution of prizes by lot or chance, and which comes within the mischief to be remedied, regarding always the substance and not the semblance of things so as to prevent evasions of the law.

While consideration paid or passed in exchange for the chance to secure a prize is an essential element of a lottery, the consideration may be money or other thing of value, and it has been held that the rule as to consideration does not mean that a scheme will be held a lottery only where money is directly given for the right to compete, but that it is only necessary that the person entering the competition shall do something or give up some right, or that some benefit may accrue to the person conducting the scheme. Thus the attracting of customers to one's business may constitute a consideration. See article on Lotteries in 38 C. J., page 291 and cases cited in notes.

The decision in the *Iris Amusement Corporation* case is also controlling upon the element of price. In that case it was contended that a scheme called "Bank Night" was not a lottery as the element of price was lacking since persons not attending the theater where "Bank Night" was held and who never paid any admission fee had a chance to win. The court, however, held that a scheme does not cease to be a lottery because some, or even many, do not have to pay to participate. In the "Bank Night" scheme

both patrons of the theater and persons outside the theater were permitted to register their names in a book and were given numbers. The lucky number was drawn by lot from the numbers given to those registered.

Among the authorities cited by the court to support its decision in the Iris Amusement Corporation case the court placed reliance upon the case of *State of Washington v. Danz* (1926), 140 Wash. 546, 250 Pac. 37, in which the defendant operated a moving picture show and distributed groceries and other property of value from the stage of the theater once each week. The property distributed cost the theater nothing, but was collected by the defendant from various stores whose compensation was derived from having their names mentioned as the goods were distributed. The distribution was by lot or chance and was known as "Country Store". Each patron of the theater received a ticket entitling him to a chance, and there was also a card placed conspicuously at the entrance to the theater advising the public that free tickets to the drawing might be had without the necessity of purchasing an admission ticket to the theater. The conviction of operating a lottery was sustained notwithstanding the contention that the element of price was lacking. So, in the instant matter there seems little doubt concerning the fact that the element of price exists.

As to the remaining element "chance" we understand your contention to be that the cash prizes are won by the skill of the participants without any element of chance. With this contention we are unable to agree.

Whether any particular patron would draw a number entitling him to compete would be a matter of pure chance. Furthermore, the likelihood of drawing a winning number would be lessened by increasing the number of tickets in the box or barrel from which drawn and the number of winning or lucky numbers which the night club proprietor decided to put into the contest. This, in our opinion, not only establishes the existence of the element of chance, but it shows that chance is the dominant factor rather than skill, as no one would have an opportunity to demonstrate his alleged skill except he were accorded it through mere chance. Were he to draw a winning number and be thus conducted by the Goddess of Chance to the final phase of the contest, whether he would be further favored by that fickle lady and be asked a question within the realm of his general or technical knowledge would be highly speculative.

Only last June this department had occasion to examine the legality of a so-called "Theater Jingle Contest" wherein prizes were awarded to theater patrons who were required to send in jingles relating to an advertising sponsor or his products. It was contended that a contestant was not required to buy any of the sponsor's products nor necessarily to be present at the theater where the winners were announced, and that to write a jingle required the exercise of skill or judgment. After reviewing a large number of court authorities establishing the principle that where both chance and skill were involved, but chance is the dominating factor, a scheme must be condemned as a lottery or chance distribution of money, we were impelled to the conclusion that the contest was violative of the public policy and statutory law of Illinois and the provision of the Municipal Code of Chicago which prohibits licenses under the City's Amusements ordinance from offering or conducting any gaming, raffle, lottery or chance distribution of money, gift or article of value in connection with their places of amusement. Opinion to Commissioner of Police, June 14, 1947.

Night clubs are public places of amusement licensed under the Amusements chapter of the Code and hence subject to the provision last referred to. See Section 104-9, Municipal Code of Chicago.

It has become the established American doctrine that in order to constitute a lottery it is not necessary for the distribution of prizes to be purely by chance, but only for such distribution to be by chance as

the dominating element, even though affected to some extent by the exercise of skill or judgment. 17 Ruling Case Law, page 1225, Section 12, article on Lotteries; *People ex rel. Ellison v. Lavin* (1904), 179 N. Y. 164, 66 L. R. A. 601; *State v. Globe-Democrat Publishing Company* (1937), 341 Mo. 862, 110 S. W. 705.

Not long ago this office was involved in litigation over the so-called "Dr. I. Q." program, which bears a very close resemblance to the scheme alluded to in your letter. This "Dr. I. Q." program was considered to be in violation of the lottery laws and the provisions of the Municipal Code. *Grant Advertising, Inc. v. City of Chicago*, 39-C-7759.

Inasmuch, therefore, as all three essential elements,—prize, price and chance, appear to be present in the scheme outlined by you, the conclusion seems inescapable that the scheme is inimical to law. Were the owner of the night club to conduct it in his public place of amusement in connection with his floor show he would subject himself to a revocation of his amusement license.

Numerous opinions have been written by this office in recent years not only upon the general subject of lotteries, but with particular reference to quiz contests, in all of which the contests were held to be illegal. See Opinions of the Corporation Counsel, Volume XXI, page 130 ("Screen Quiz"); Volume XXI, page 132 ("Hollywood Movie Quiz"); Volume XXI, page 132 ("The Ghost Walks"); Volume XX, page 91 ("Screeno").

The onus of this opinion is not borne by us alone. It is rooted in the Constitution and statutory law of the State. Substituting for the indirect cover charge or the pecuniary benefit to the proprietor of the night club, the direct price of admission paid in "Bank Night", it may be said with equal force concerning the instant scheme what the Supreme Court of Illinois said in the Iris Amusement Corporation case (p. 266):

"In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its chance for a large prize, which may become large enough to arouse intense cupidity; there is the excitement of drawing a lucky number with its attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus created cupidity, envy, jealousy and temptation—the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries. * * * Our public policy against lotteries expressed in two constitutions, in the Criminal Code, and in the ordinance before us, is much too firmly rooted to be evaded by any chimerical device."

AUTOMOBILE RAFFLE

(No. 11028—City Collector—A. A. P.—February 9, 1948.)

An automobile raffle is illegal as being in violation of the provisions of the State Statute and Municipal Ordinance of Chicago, notwithstanding, that said raffle is being conducted by a non-profit educational organization.

Citations:

Statute: IRS '47, Ch. 38, Sec. 182, par. 408.

Ordinance: Municipal Code, 191-2.

Cases: 40 Ill. 465, 467.

59 Ill. 160, 164.

OPINION OF FOREGOING SYNOPSIS

This is to acknowledge receipt of yours of the 5th inst., in which you refer to this office a letter received by you from a private organization. It is stated in the enclosure that the group, a non-profit educational organization, is considering the raffle of an automobile as a fund raising measure. The treasurer does not outline the method which will be followed in the proposed raffle. However, any plan which contemplates the distribution of prizes by chance constitutes a lottery, which is prohibited by Statute, Paragraph 408 (Section 182) Chapter 38, Illinois Revised Statutes 1947, and by Ordinance, Section 191-2, Municipal Code of Chicago 1939, as Amended.

In the case of *Dunn v. The People*, 40 Illinois, Page 465, on Page 467 the Court in defining what constitutes a lottery said (in part) "a lottery is a scheme for the distribution of prizes by chance." The Court further said, Page 468, "if every ticket in an ordinary lottery represented a prize of some value, yet if these prizes were of unequal values the scheme of distribution would still remain a lottery. * * * He may choose to call his business a gift sale, but it is nonetheless a lottery, and we can not permit * * * to evade the penalties of the law by so transparent a device as a mere change of name."

In the case of *Thomas v. The People*, 59 Illinois, Page 160, the Court cited with approval the Dunn case, and said further, Page 164, "the distribution could not be in a just and legal manner, unless the number of purchases was the same as the number of prizes, and the prizes received proportional, as nearly as possible, to the amount of money paid. * * * Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. * * * The temptations, however, are thrown in the way of a larger number and a better class. The evil may spread more widely and, in fact, more deeply."

It was claimed in that case that the object for which the lottery was being conducted was "high and holy, * * * to redeem an unfortunate class from ruin and degradation and a fate worse than death, * * *. The law does not manifest sympathy, but dispenses even-handed justice. Justice enthroned in its majesty smiles and frowns upon all alike. Submission to its authority is incumbent upon all."

As heretofore observed, the plan for the conducting of the raffle is not clearly outlined, but we assume that chances or tickets would be sold and that a drawing will be held and the lucky person will receive the automobile. In such an event, the raffling of an automobile is in violation of the provisions of the Statute and the Municipal Code of Chicago and, consequently, unlawful.

AUTOMATIC AMUSEMENT MACHINES

(No. 11096—M. H. F.—December 15, 1948.)

Chicago regulates automatic amusement machines under section 193-26 of the Municipal Code. Under this ordinance coin controlled devices may be kept and used in places of public resort provided they are not such as are prohibited as gambling implements or bagatelle or pigeonhole devices.

Citations:

- Statute: IRS '47, Ch. 24, sec. 23-56.
- Ordinance: Municipal Code, 193-26.
- Cases:
 - 296 Ill. 70.
 - 296 Ill. App. 645.
 - 297 Ill. App. 130.
 - 299 Ill. App. 117.
 - 10 N. Y. L. J. 667.

OPINION OF FOREGOING SYNOPSIS

Chicago taxes automatic amusement machines under an ordinance, copy of which is herewith enclosed. Under this ordinance coin-controlled devices may be kept and used in places of public resort provided they are not such as are prohibited as gambling implements or bagatelle or pigeonhole devices prohibited by section 193-26 of the Municipal Code of Chicago, copy of which is enclosed.

During recent years we have had considerable litigation over section 193-26. Perhaps a reading of the following cases would be interesting to you: *Levins v. City of Chicago*, 296 Ill. App. 645; *Coleman v. City of Chicago*, 297 Ill. App. 130; *Silfen v. City of Chicago*, 299 Ill. App. 117, appeal to Supreme Court denied, 299 Ill. App. 117; *People v. One Pin Ball Machine*, 316 Ill. App. 161; *Village of Atwood v. Otter*, 296 Ill. 70.

The city's power to enact section 193-26 is found in section 23-56 of the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes, which section reads as follows:

"To license, tax, regulate, or prohibit pin, ball, or bowling alleys billiard, bagatelle, pigeon-hole, pool, or any other tables or implements kept for a similar purpose in any place of public resort."

We hear that New York City has recently prohibited the keeping and use of all such devices. It was reported in one New York case (*Savoy Vending Company v. Valentine*, 107 N. Y. L. J. 667) that the estimated annual "take" from the contraptions had exceeded \$20,000,000.00.

E. OTHER HEALTH AND WELFARE REGULATIONS

FORCING TUBERCULOSIS CASES TO HOSPITALS

(No. 10755—President, Municipal Tuberculosis Sanitarium—F. V. M.
—October 27, 1943.)

The Board of Directors of the Municipal Tuberculosis Sanitarium has the power to compel "open cases" of tuberculosis to enter the Municipal Tuberculosis Sanitarium for treatment.

Citations:

Statutes: IRS '39, ch. 24, sec. 547. ch. 111½, par. 22.
IRS '43, ch. 111½, par. 22.

Other references: Regulations of the Illinois Department of Public Health, pps. 100, 101, 119, 120.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of October 15, 1943, in which you state that the Board of Directors of the Municipal Tuberculosis Sanitarium, at its last meeting Tuesday, October 5, 1943, received a report in connection with the casefinding survey for the week ending October 2, 1943, showing that 473 far advanced cases of tuberculosis have been found to date in the survey, and that of these approximately fifty percent will be positive sputum (open cases) of tuberculosis.

You further state that it is the belief of the Board of Directors that all open cases of tuberculosis should be hospitalized in the same manner as other contagious diseases, and that under the rules and regulations for the control of communicable diseases, health authorities cannot compel hospitalization of persons suffering with tuberculosis unless they are in contact with children under the age of sixteen years, and unless the patients fail to take proper precautions as laid down by the Department of Public Health of the State of Illinois; that the members of the Board of Directors would like to know how to proceed in such matters, and you inquire as to whether or not the present legislation is ample to authorize the hospitalization of open cases in a hospital, even though the patient refuses to cooperate.

In reply thereto we quote an opinion of this office given the Chicago Board of Health under date of November 13, 1940:

"In reply to your letter of September 23, 1940 with reference to the forcible hospitalization of tuberculosis patients, we advise you as follows.

"We will first answer question number 2 by quoting from the Illinois Revised Statutes (1939), chapter 24, section 547:

"* * * All officers and employees of any such public tuberculosis sanitarium shall severally be deemed officers or employees as the case may be, of the city or village in which such sanitarium is established."

The wording of the foregoing section has since been changed by the legislature, but the import remains the same.

"* * * All officers and employees of such a public tuberculosis sanitarium shall be deemed officers or employees, as the case may be, of the city or village which established the sanitarium."

"We now answer question number 1.

"Referring to chapter 111½, par. 22, Illinois Revised Statutes (1939), and the part quoted therefrom by you as follows:

"* * * It shall be the duty of all local boards of health, health authorities and officers, police officers, sheriffs, constables and all other officers and employees of the state or any county, village, city or township thereof, to enforce the rules and regulations that may be adopted by the state board of health."

The following slight change has been made in this section, although, the tenor of the section has not been altered, Ill. Rev. Stats. 1943, chap. 111½, par. 22, p. 2469:

"* * * All local boards of health, health authorities and officers, police officers, sheriffs, constables and all other officers and employees of the state or any county, village, city or township thereof, shall enforce the rules and regulations so adopted. * * *"

"and the regulation of the Illinois Department of Public Health also quoted by you:

"Isolation and Hospitalization of 'Open Cases': All 'open cases' of tuberculosis, in the care of which the necessary precautions to prevent conveyance of the infection to others directly or indirectly as detailed under 'Precautions to be Observed by Patients', (see pages 119, 120) are not being taken by the patient, *shall be hospitalized*, if hospital facilities for this class of patients are available, unless case is effectively isolated on the premises and if this is not done, all children under sixteen years of age shall be removed from the premises.'"

The foregoing regulation of the Illinois Department of Public Health has been changed to read as follows:

"Isolation and Hospitalization of 'Open Case':

1. All 'open cases' of tuberculosis shall be hospitalized where such facilities are available, if the necessary care to prevent infection of others is not being maintained. See 'Precautions to be observed by Patients', pages 100, 101. Where hospital facilities are not available, and the patient not effectively isolated or cared for as stated above, all children under 16 years of age shall be removed from the premises. * * *"

"we are of the opinion that the Board of Directors of the Municipal Tuberculosis Sanitarium as officers of the City of Chicago are by chapter 111½, par. 22, and the foregoing regulation of the Illinois Department of Public Health, authorized forcibly to take to a hospital other than a municipal tuberculosis sanitarium, if such municipal tuberculosis sanitarium is fully occupied, an 'open case' of tuberculosis in the care of which the necessary precautions to prevent conveyance of the infection to others are not being taken by the patient. However, it is our opinion that the Board of Health is primarily charged with the responsibility for the forcible hospitalization of such patients."

DISPOSAL OF UNCLAIMED GOODS

(No. 10756—Commissioner, Chicago Welfare Administration—F. V. M.
—October 27, 1943.)

Without additional statutory authority the Welfare Administration cannot legally dispose of personal belongings left in City Relief Shelters.

Citation: IRS '43, ch. 71, par. 4.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of October 19, 1943 with reference to personal belongings left with the City of Chicago Welfare Administration by certain classes of single men who have lived in relief shelters. You state that the shelters were closed on November 4, 1942, and that none of these men have made claim for these personal belongings and you ask to be advised if there is any basis on which you may be able to dispose of same.

The status of the Welfare Administration in connection with the custody of this personal property is that of a gratuitous bailee.

In the case of *Crosby v. 20 Fifth Avenue Hotel Co.*, N.Y.S. (2d) 227-231, the court said:

"(3-5) A gratuitous bailee has the duty of exercising slight care and liable only for what is termed gross negligence. At common law a gratuitous bailee had no right to sell the bailor's goods without the bailor's consent. If he did so he was guilty of a conversion. *Dale v. Brinckerhoff*, 7 Daly 45. If he desired to terminate the bailment it was his duty to notify the bailor and request him to remove the goods, and even after such a request, if the bailor failed to take away the goods, the bailee could not sell them. It was his duty to place the goods in storage and duly notify the bailor. Thereafter the warehouseman could sell after notice for his storage charges."

We find a comparable situation in the case of an inn-keeper with whom the baggage of guests is deposited for storage after the guests leave the inn or hotel. A means of disposal of such effects is provided for by statute. We quote from Ill. Rev. Stats. 1943, chapter 71, Inn-keepers:

"4. *Baggage left by guest.*) § 4. Whenever any person shall suffer his baggage or property to remain in any hotel after leaving such hotel as a guest, and after the relation of inn-keeper and guest between such guests and the proprietor of such hotel has ceased, or shall forward the same to such hotel before becoming a guest thereof, and the same shall be received into such hotel, such hotel proprietor, after the lapse of ten days, may, at his option, hold such baggage or property at the risk of such owner, or he shall have the right to deposit such baggage or property in a storage warehouse, in which event he shall take from the proprietor of such storage warehouse a receipt for the same, in the name of the owner thereof, and hold the same for such owner; and such hotel proprietor, after he shall have so deposited such baggage or property in such storage warehouse, shall not be responsible for the loss thereof to such owner, provided he shall deliver to the owner of such baggage or property said storage warehouse receipt upon demand."

However, we are of the opinion that the City of Chicago Welfare Administration does not come within the classification of inn-keeper.

It is assumed by us that the former inmates of these shelters who have left this personal property with the Welfare Administration were given checks or receipts therefor so that same might be properly claimed at some future date by the owners thereof, and if so we are of the opinion that without statutory authority therefor the Welfare Administration cannot legally dispose of these personal belongings. It is therefore suggested that the State Legislature be requested to provide a means of disposal of like property checked or left for safekeeping so that overseers of the poor may not be charged with this responsibility in the future.

LEAVING CHILDREN

(No. 10794—Alderman, 43rd Ward—A. F. G.—June 13, 1944.)

The City of Chicago has no power to enact an ordinance penalizing persons for leaving minor children of tender age alone at home or in public places. Ample provision in such cases has been made by the legislature. The State's Attorney has the duty of enforcing such provisions, and all such cases should be brought to the attention of that officer for such action as he may deem proper.

Citation: IRS '43; ch. 38, Sec. 95.

OPINION OF FOREGOING SYNOPSIS

Your letter of June 8, 1944 is as follows:

"At the meeting of the Committee on Traffic and Public Safety of this day, acting chairman Cowhey suggested that I write to you asking for an opinion as to the power of the City Council to pass an ordinance which would impose certain penalties for leaving minor children of tender age without any supervision.

- a. In homes or other private place;
- b. On public ways or any public place.

The importance of this is in connection with the employment during war conditions of the adult members of the family, leaving such children to become victims of traffic accidents on one hand or other types of accidents in the home."

We find no express power vested in the City of Chicago to enact the legislation proposed in your letter.

Ample provision, however, seems to have been made by the legislature to prevent and punish such acts of negligence by persons charged with the custody of children.

Section 4 of "An Act to prevent and punish wrongs to children" approved May 17, 1877, which is section 95 chapter 38 (Criminal Code) Ill. Rev. Stats. 1943 p. 1148, is as follows:

"It shall be unlawful for any person having the care or custody of any child, wilfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or wilfully cause or permit such child to be placed in such a situation that its life or health may be endangered."

Section 5 of the Act provides the penalty for violation of the statute.

The State's Attorney has the duty of enforcing the provisions of the Criminal Code, and we would suggest that whenever such cases arise they should be brought to the attention of that officer for such action as he may deem proper.

PANDERING

(No. 10811—Public Vehicle License Commissioner—E. J. B.—August 24, 1944.)

The first offense of pandering is not a felony but a misdemeanor. The second offence is a felony.

Citations:

Statutes: IRS '43, ch. 38, par. 170.

Cases: 335 Ill. 570.

342 Ill. 290.

359 Ill. 455.

33 Ill. App. 651.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to whether the first offense of pandering is a felony, the following is submitted:

We quote first from the Illinois Revised Statutes of 1943, State Bar Edition, Chapter 38, P. 585 "A felony is an offense punishable with death or by imprisonment in the penitentiary."

Paragraph 170, Chapter 38 of said revised statutes defines pandering and concludes by saying that he who shall be guilty of pandering upon a first conviction * * * shall be punished by imprisonment in the county jail or house of correction for a period of not less than six months nor more than a year and by a fine of not less than three hundred dollars and not to exceed one thousand dollars, and upon conviction for any subsequent offense under this act shall be punished by imprisonment in the penitentiary for a period of not less than one year nor more than ten years.

Our Appellate Court in *Beattie v. People* 33 Ill. App. 651 stated, "If alternative penalties are provided by statute, one of which is imprisonment in County Jail or fine, the offense is a misdemeanor though accused might have been confined in the penitentiary in discretion of jury.

In *People v. Stavarakas*, 335 Ill. 570 the court stated, "When offenses may be punished by imprisonment in the penitentiary, or by fine only, or by punishment in penitentiary and by fine, in the discretion of the court

or jury, it is only a "misdemeanor" under statutes defining felony as an offense punishable with death or by imprisonment in the penitentiary and making other offenses "misdemeanors."

In *People v. Anderson*, 342 Ill. 290 the court stated, "offenses where punishment prescribed is imprisonment in penitentiary or imprisonment in county jail, or fine, is a misdemeanor."

Again in *People v. Bain*, 359 Ill. 455 the court stated that where an offense may be punishable by imprisonment in the penitentiary or fine only, or by incarceration in a penitentiary and by fine, in discretion of court or jury, it is not a felony but a misdemeanor.

In view of the above statements and the decisions of our Appellate and Supreme Court, we are of the opinion that the first offense of pandering is not a felony but a misdemeanor. However, the second or subsequent offense is a felony.

FENCE ORDINANCE

(No. 10813—Alderman, 41st Ward—F. P. C.—September 18, 1944.)

The City does not have the power to enact ordinances providing that fences made of wood or other combustible material shall be at least fifty per cent open, and that a surveyor's plat of the area to be enclosed be submitted with an application for a permit. Although the City has the power to regulate the height of wooden fences under the police power it does not have the power to prohibit them as spite fences.

Citations:

Statute: IRS '43, ch. 24, art. 23, secs. 23-69.

Cases: 68 Ill. 478.

136 Ill. App. 488.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your correspondence with this office dated August 1, 1944, in which you state you have had a great number of complaints about "spite fences", which you do not believe are sufficiently regulated by the building ordinances. You also suggest that the present ordinance requiring permits for all fences over five feet in height be amended to include all fences over fifty inches in height; that any fence made of wood or other combustible material shall be at least fifty percent open and also that all applications for fence permits shall be accompanied by a surveyors plat of the area which it is proposed to enclose.

The city's power in the premises is somewhat limited. It is derived from the Cities and Villages Act, Art. 23, Section 23-69, Chap. 24 (see Rev. Stats. 1943, p. 409) which is as follows: "To regulate partition fences and party walls." The city also enjoys some power over the subject under the general police power if the fence is a nuisance.

The statutory power to regulate is limited only to "partition fences" which are those fences between adjoining property erected and maintained by agreement between the adjoining property owners on what they consider the property line. The fences you refer to are apparently not of this character.

Under the common law a property owner could use his property as he saw fit and erect a fence on it of any kind or character. The courts of this state are inclined toward this view and only limit the right where the fence is imminently dangerous to the public safety and a nuisance. In the absence of a prescriptive right or grant the courts do not recognize a right in an adjoining property owner to unobstructed view and light and air; and if a party erects a fence on his property which is not a "partition fence" within the meaning of the statute, his motive in so doing, be it spiteful or otherwise, is immaterial. (*City of Dixon v. Messer*, 136 Ill. App. 488 (1907).)

If a fence is built in such a way or of such materials as to be dangerous to the public safety, the city's power to abate nuisances could be invoked; but a fence which is merely unsightly or cuts off light and air in the absence of agreement grant or prescriptive right could not be considered a nuisance. (*Guest et al. v. Reynolds*, 68 Ill. 478 (1873).)

In the light of the foregoing we do not believe the city has the power to enact ordinances providing that fences made of wood or other combustible material shall be at least fifty percent open and that a surveyors plat of the area to be enclosed be submitted with an application for a permit; although we believe the city has the power to regulate the height of wooden fences under the police power, it does not have the power to regulate or prohibit them as "spite fences."

GOVERNMENT BUILDINGS

(No. 10814—Commissioner of Buildings—A. F. G.—September 22, 1944.)

The Building Department may not pursue a policy of exempting buildings constructed for and in behalf of governmental agencies from the jurisdiction of their department and its requirement of obtaining building permits.

No References.

OPINION OF FOREGOING SYNOPSIS

"The general contractors for the construction of the Air Craft Engine Parts Plant of the Studebaker Corporation at 5555 Archer Ave., Chicago, have addressed a communication to this department relative to obtaining a building permit for said structures, acting for and in behalf of Defense Plant Corporation. The buildings in question were erected two and three years ago as war measures.

"At the time said buildings were in contemplation and under construction, this department had adopted a policy to the effect that

buildings constructed for and in behalf of Federal governmental agencies did not require building permits and were not under the jurisdiction of this department.

"Your advice is requested as to whether this policy was correct and whether we can comply with the present request to set in writing that building permits were not required by the City of Chicago on Defense Plant Corporation structures."

The same question was presented to this department, involving the same company, the same plant, and the same kind of building permit fees, and was answered in an opinion to the chairman of the Committee on Finance dated April 22, 1943, copy of which was sent to you.

The contractor for the construction of the Studebaker plant requested that the company be reimbursed for fees totalling \$852.50 paid by it for building permits, and submitted the following as a basis for its claim:

"It develops that the lot occupied, as well as the building, is owned entirely by the Defense Plant Corporation, a subsidiary to the Reconstruction Finance Corporation, which are agencies of the Federal Government. The Studebaker Corporation, in this particular instance, is merely employed by the above mentioned agencies to operate this plant, and therefore cannot in any sense be considered as the owners. Therefore, since this property is owned by the Federal Government, we believe that your department was in error in charging us the above mentioned amount for the building permit."

After a discussion of the legal question involved we said:

"Our opinion therefore is that the permit fees paid by the construction company were legally exacted and that the company is not entitled to have the same refunded to it."

In another opinion dated May 26, 1943 to the same official involving a claim for a refund of building permits fees for the erection of buildings at a defense plant located at 114th street and Burley avenue we expressed a similar view. Claimants sought the return of the monies on the ground that in erecting the buildings it functioned as the agent of Republic Steel Corporation, acting for and on behalf of Defense Plant Corporation and that Defense Plant Corporation is immune from such payment. We said:

"Our opinion, therefore, is that the enforcement of the building ordinances in the case of contractors erecting war plants for the Defense Plant Corporation is sanctioned by the established law. The permit fees in question having been paid pursuant to the terms of ordinances which we regard as not directly interfering with the functions of the Federal government, but valid and enforceable, were therefore properly paid and should not be refunded."

In an opinion furnished the Revere Copper and Brass Incorporated, April 21, 1943, we reached the conclusion and expressed the view that that company which was operating a plant owned by the Defense Plant Corporation for the production of war materials was nevertheless subject to regulation and license under the city's Foundries ordinance. A copy of this opinion is herewith enclosed.

From the foregoing we are of the opinion that the policy of your department that buildings constructed for and in behalf of Federal governmental agencies did not require building permits and were not under the jurisdiction of your department is not correct and would advise you not to set out in writing that building permits are not required by the city on Defense Plant Corporation structures as such a statement would as you can see be in conflict with repeated holdings of this department.

SMOKE INSPECTION

(No. 10815—Alderman, 50th Ward—A. F. G.—September 25, 1944.)

Under the Municipal Code the deputy smoke inspector may exercise his powers not only within the limits of the City but also within one mile of such limits.

Under state statute the City is given the power to prohibit any offensive or unwholesome business or establishment within the municipality and within the distance of one mile beyond the municipal limits.

Citations:

Statutes: IRS '43, ch. 24, secs. 23-88, 23-89, ch. 38, sec. 466.

Ordinances: Municipal Code, 99-3, 99-71, 99-72.

Cases: 88 Ill. 221.

261 Ill. 16.

366 Ill. 526.

Other references: 43 C.J. sec. 233.

46 C.J. sec. 113.

2 McQuillan Mun. Corp. (2d ed.) Sec. 693.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letters of September 7 and 8, 1944 in reference to the plant of a brick company. The company operates a kiln for the manufacture of brick and has operated it for more than thirty years. The growth and development of the city has brought the kiln in close proximity to a number of fine homes.

You state that recently a number of complaints have reached you from property owners near the kiln concerning large volumes of smoke being emitted from the plant. You state also that a survey shows that the kiln is not within the limits of the City of Chicago. You ask what authority is vested in the city or in certain of its officials to proceed in the abatement of this nuisance in view of its location outside the boundaries of the city?

As a general rule a municipal corporation's powers cease at municipal boundaries and cannot without plain manifestation of legislative intention be exercised beyond its limits. Within, and subject to its constitutional limitation, the legislature, however, may, and often does, authorize the exercise of powers beyond municipal limits, particularly in matters within the police powers. (Corpus Juris 43 section 233.)

In discussing this rule our Supreme Court said concerning an ordinance of the City of Rockford which attempted to regulate and license ice cream factories outside of the corporate limits of the city.

"Municipalities have no extra-territorial jurisdiction except in so far as it is expressly or impliedly delegated by statute (citing cases.) An inherent or implied limitation upon the city in the exercise of the powers delegated to it by the legislature is that such powers shall be exercised within the corporate boundaries of the municipalities. Ordinances cannot have extra-territorial effect unless power is plainly conferred upon the corporation. Municipal ordinances are, therefore, necessarily local in their application, operating usually only in the territory of the municipality by which they are enacted and without force be-

yond it. (2 McQuillan on Mun. Corp. (2nd ed.) sec. 693.) It is, of course, competent for the legislature to confer power to pass ordinances operative beyond the corporate boundaries for the purpose of suppressing and preventing nuisances which affect the inhabitants of the corporation (2 id. sec. 693; *Chicago Packing and Provision Co. v. City of Chicago*, 88 Ill. 221." *City of Rockford v. Hey*, 366 Ill. 526 (1937).

Under the power last referred to, the legislature has enacted sections 23-88 and 23-89 of the Revised Cities and Villages Act which are as follows:

"§ 23-88. LOCATE PACKING HOUSES, TANNERIES.) To locate and regulate the use and construction of packing houses, factories for the making of tallow candles, fertilizers, or soap, and tanneries within the municipality, and within the distance of one mile beyond the municipal limits."

"§ 23-89. PROHIBIT OFFENSIVE BUSINESS.) To prohibit any offensive or unwholesome business or establishment within the municipality and within the distance of one mile beyond the municipal limits."

Under these sections the municipality for the specific purpose of locating, regulating or suppressing certain offensive establishments have had their boundaries enlarged one mile in every direction from the city limits proper. Do either or both of these sections authorize the city to proceed against the offending brick making establishment?

We do not believe such authority is found in section 23-88 as that section specifies particular businesses, and express enumeration of certain occupations over which municipalities are given control is an exclusion of all others. *People ex rel. Friend v. Chicago*, 261 Ill. 16 (1914).

But section 23-89 is broader, and is not limited to particular businesses or establishments but grants power to the municipality to prohibit "any offensive or unwholesome business or establishment." The courts have not construed this section but if they had, we believe they would hold as they did in construing section 23-88 that the general assembly by this enactment assumes and virtually declares that this character of business in or near cities is noxious to the health or comfort or both of their dense population, and in granting ex-territorial powers to municipalities to prevent annoyance and injury to the health and comfort of its citizens by such offensive establishments provided by this enactment the means of protecting themselves against such intolerable wrongs as might thus be inflicted on them. (*Chicago Packing Company v. City of Chicago supra.*)

A plant such as the one complained of, emitting dense smoke, noxious gases and odors outside of the corporate limits of the city but adjacent to populous residential sections of the city is clearly the kind of "offensive or unwholesome establishment" which the legislature intended by this section the municipality should have power to protect its citizens against.

The business of brick making or burning brick being a lawful one, it is not necessarily a nuisance. But while it is not classed as a nuisance per se, such business may be a nuisance, depending upon its location, the manner of conducting it, and other circumstances. 46 Corpus Juris, section 113. Joyce in his work on Nuisances says at Section 111: "A brick kiln is not a nuisance per se though it may become a nuisance where by reason of its location the smoke and noxious gases therefrom cause material discomfort to the occupants of neighboring residences."

The brick plant here in question operated as your letter indicates is undoubtedly a nuisance under this rule and by the statutes of this state. Sub-paragraph 8 of section 466 of chapter 38 (criminal code) Ill. Rev. Stats. 1943 declares it to be a public nuisance:

"To erect, continue or use any building or other place for the exercise of any trade, employment or manufacture, which by occasioning noxious exhalations, offensive smells or otherwise is offensive or dangerous to the health of individuals or of the public."

Section 99-3 of the municipal code of Chicago is as follows:

"In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated or prevented in addition to what may be declared such herein, those offenses which are known to the common law of the land and the statutes of Illinois as nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as such and proceeded against as is provided in this code, or in accordance with any other provision of law."

Under this section the powers vested in the deputy smoke inspector by sections 99-71 and 99-72 summarily to abate the emission of dense smoke may be exercised by that officer not only in the limits of the city but also within one mile of such limits.

It is our opinion, therefore, that Mr. Chambers has the same power to proceed against this plant as he would have if the plant were located within the boundaries of the city and the captain of the Rogers Park Police Station may take the same action in reference to complaints about noise, hammering, etc., at the kiln as he would take if the plant were in the city limits.

STRIKE ORDINANCES

(No. 10892—J. H. S.—March 15, 1946.)

There is no City Ordinance directly affecting the employer-employee relationship in the event of a strike. However, with respect to boiler engineers and electricians there are general ordinances designed to protect property and persons which may be pertinent to situations that might arise in the course of a strike.

Citation: Municipal Code, 82-25, 86-47 to 96-54, 174, 174-2, 174-10.

OPINION OF FOREGOING SYNOPSIS

Your recent undated letter addressed to the city comptroller's office received by the comptroller on March 4, 1946 has been referred to us for reply. Your letter inquires whether there is a city law that governs the number of employees that must be left in a plant in the event of a strike, especially in regard to boiler engineers or electricians.

There is no city ordinance which directly operates upon the employer-employee relationship in the event of a strike. However, with respect to boiler engineers and electricians there are general ordinances designed to protect property and persons which may be pertinent to situations that might arise in the course of a strike.

Chapter 174 of the Municipal Code of Chicago regulates stationary engineers and boiler tenders. Section 174-2 requires that steam engines and boilers shall be operated only by a duly licensed engineer or boiler

tender. Operation of a boiler by any individual without a license is prohibited except in the case of boilers carrying not more than ten pounds pressure of steam per square inch. Section 174-9 authorizes the board of examiners to suspend or revoke the license of an engineer or a boiler or water tender for permitting water to get too low in the boiler, for carrying a higher pressure of steam than allowed by law, for an absence from his post of duty, or for any violation of the provisions of the chapter, or other neglect or incapacity. Section 174-10 make it the duty of the board of examiners to see that each boiler plant in the city shall have a licensed engineer, or boiler or water tender, or both, in charge at all times when working under pressure, and each engineer or boiler or water tender shall devote his entire time, while boilers are working under pressure, to the duties of the plant under his charge.

A violation of any of the provisions of chapter 174 carries a penalty of not less than \$5.00 nor more than \$100.00 for each offense.

With respect to electrical equipment and apparatus, the Municipal Code of Chicago contains chapters 86, 87 and 88. The sections of these chapters relate mainly to standards of installation and repair of the electrical equipment and apparatus. Sections 86-47 to 96-54 provide for the issuance of maintenance permits. No permit may be issued to any person until such person shall have appointed or employed a supervising electrician. Section 86-25 provides that whenever a supervising electrician shall leave or be discharged from the employ of any person who is required by ordinance to appoint or employ a supervising electrician, a notice in writing thereof shall be given within 5 days by both the employer and the supervising electrician to the electrical inspection division, and the permit privileges of such a person, shall without further order or action by the electrical inspection division stand suspended until the employment or appointment by such person of a supervising electrician.

The ordinances above described impose duties upon both the owner of the premises and the boiler engineers and the supervising electrician. While the ordinances do not attempt to regulate the conduct of either the employer or the employee specifically in the case of a strike, it is broad enough to cover all possible contingencies in order that the safety of property and persons will be assured.

ELECTRIC MOUSETRAP

(No. 10907—Chief Electrical Inspector—J. H. S.—August 19, 1946.)

The Division of Electrical Inspection may express its views and opinions as to the safety of an electric mousetrap, to the manufacturer, the vendors, and to the general public, pointing out the hazards which the Division believes to be present in the use of the mousetrap in question.

Citations: 18 Op. Corp. Coun. 427.

18 Op. Corp. Coun. 454.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of August 8, 1946, requesting our opinion on what action the Division of Electrical Inspection

can take when any electrical device, which inherently presents a life hazard is offered for sale in the city. You ask whether your Division can express an opinion in writing, to the vendor or manufacturer of such device as to the hazard presented in the recommended use thereof. Your inquiry is stated to be prompted by an advertisement in the Chicago Tribune of August 8, 1946, which you transmit with your letter. The advertisement relates to a mouse trap which electrocutes the mouse and then throws it clear of the trap.

We have carefully examined the Municipal Code of Chicago and the Revised Statutes of Illinois and find no law or ordinance prohibiting the sale of electrical appliances which present hazards to life inherent in their use.

On March 28, 1932, we expressed our opinion to the Commissioner of Street and Electricity, in response to a similar inquiry, that the best way to control the situation presented by dangerous electrical contrivances, in the absence of express authority from the State Legislature empowering cities to license the sale of electrical appliances, is through the education of the public as to the inherent danger of substandard electrical devices. (Opinions of the Corporation Counsel, Vol. XVIII, p. 454.)

In a subsequent opinion to the Commissioner dated October 8, 1932, we said:

"There is no federal or state law that we are aware of that seeks to infringe upon the right of any citizen or public official to advocate by education or other peaceable means in the interest of the public welfare the elimination of sub-standard electrical materials from the Chicago market. Moreover, in our opinion such a law would be clearly invalid as repugnant to fundamental rights guaranteed by the federal constitution and the constitution of Illinois." (Opinions of the Corporation Counsel, Vol. XVIII, p. 427.)

It is accordingly our opinion that you may express your views concerning the appliances in question to the manufacturer, the vendor and to the public, pointing out the hazards which you believe are present in its use.

OUTDOOR AMPLIFYING SYSTEM

(No. 10910—Chairman, Noise Abatement Committee—F. T. M.—September 18, 1946.)

An outdoor amplifying system used in connection with a sermon or discussion is not in itself a violation of the noise abatement ordinance, but may become so when the use of unnecessary and excessive volume results in the disturbance of the public peace and quiet.

Citations:

Statute: IRS '45, Ch. 24, 23-58.

Ordinance: Municipal Code, 99-56.

Cases: 46 Ill. 9.

247 Ill. 366, 371.

OPINION OF FOREGOING SYNOPSIS

This department is in receipt of your letter of August 26, 1946, requesting an opinion with respect to the use of an outdoor amplifying system in connection with church services.

Authority to prevent and suppress noises is given to the City Council by Sec. 23-58 of Article 23 of the Revised Cities and Villages Act, which reads:

"The corporate authorities shall have power to prevent or suppress riots, routs, affrays, noises, disturbances and disorderly assemblies in any public or private place." (Ill. Rev. Stats. 1945, Chap 24, par. 23.58.)

Section 99-56 of the Municipal Code of Chicago reads as follows:

"No person shall make, or cause, permit or allow to be made, upon a public way, or in such close proximity to a public way as to be distinctly and loudly audible upon such public way, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand organ, mechanically operated piano, other musical instrument, wind instrument, sound amplifiers, or similar mechanical device; provided, that the said restriction shall not apply to any licensed peddler crying or calling for the purpose of advertising goods, wares or merchandise when lawfully using any public alley between the hours of 11 A. M. and 6 P. M."

An ordinance similar to Section 99-56 was examined and upheld by the Supreme Court of Illinois in the case of *Goodrich v. Busse*, 247 Ill. 366 (1910). In sustaining the ordinance the court said at page 371:

"While it may be conceded that the appellant has the right to sell fruits and vegetables upon the public streets and alleys of the City, clearly he had no vested property right resting in him to make a noise upon the streets of the city by advertising his fruits and vegetables by public outcry in such places, any more than he would have the right to advertise such articles by any other means upon the streets and alleys of the city the result of which would be to disturb the peace and quiet of the neighborhood in which he pursues his calling."

In the case of *Tisdale v. The Town of Minonk*, 46 Ill. 9 (1867) the Supreme Court held that a Municipality "had authority to declare by ordinance, that making loud and unusual noises to the disturbance of the peace and quiet of the town should be an offense punishable by fine * * *."

In our opinion, Section 99-56 was enacted to prohibit loud and unusual noises, the result of which would be to disturb the peace and quiet of a neighborhood. The use of discretion must be employed in the application and enforcement of this ordinance. The ordinance prohibits noise of any kind by means of any whistle, bell or horn but has not and could not be enforced against the whistle of a train, the noise of an automobile horn or the gong of a trolley car, these everyday noises being necessary for the safety of pedestrians and others. Disturbing noises were to be prohibited.

The matter of application and enforcement would depend upon the facts in a particular case. An outdoor amplifying system when used to afford persons interested the privilege of hearing a sermon or discussion is not in itself a violation of the ordinance, but may become so when the use of unnecessary and excessive volume results in the disturbance of the public peace and quiet.

MUSEUM ELEVATORS

(No. 10965—Commissioner of Buildings—M. H. F.—May 14, 1947.)

The City of Chicago has authority to inspect the elevator equipment located in the Museum of Science and Industry, and charge a reasonable fee therefor.

Citations:

Statutes: IRS '45, Ch. 24, Secs. 23-70, 23-71, 23-72, 23-73, 23-75.

Cases: 311 Ill. 23, 247.

355 Ill. 65.

Other references: 3 Op. Corp. Coun. 158.

13 Op. Corp. Coun. 35.

18 Op. Corp. Coun. 39.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date states that the Museum of Science and Industry, located in Jackson Park, within the Chicago Park District, objects to having the elevator inspectors of your department making and the city charging for semi-annual inspections of their elevator equipment, on the ground that the city has no jurisdiction over the premises. Our attention is invited to an opinion rendered by this department March 28, 1932, to the effect that the responsibility of your department over buildings within territory controlled by the South Park Commissioners was the same as that over similar structures not located on park property. You also refer to a case tried in 1938, in which a judge of the Municipal Court of Chicago is said to have held that it was not within the jurisdiction of the City of Chicago to inspect or demand a permit with respect to a building constructed on park land any more than such action might be taken for the construction of a building in Evanston, Illinois. In view of these opposite reactions you now request our opinion as to whether or not the Department of Buildings has jurisdiction over elevators and their installation at the above mentioned museum.

The Municipal Court case referred to apparently was not reviewed and affirmed by a higher court, so it is not seen that it would be helpful in determining the question now presented.

We have re-examined our opinion of March 28, 1932 and find no reason to depart from the views therein expressed. The opinion has reference to buildings erected on land within the South Park District for the Century of Progress Exposition. Because of the special powers conferred by the legislature in and by an act entitled "An Act in relation to the 'Chicago World's Fair Centennial Celebration,'" in force June 18, 1929, and the adoption by the South Park Commissioners of a "Century of Progress Building Code," the present day situation is not quite parallel to that involved in 1932. The decision of the basic legal question of the city's power and the review of the authorities discussed, however, are thought to be persuasive upon the instant matter. These authorities make it clear that the city's police powers which extend beyond the purposes of park organization, maintenance and control, are exercisable over the whole city, including park territory embraced within the city's territorial limits.

The fact may not be lost sight of that the parks located within the territorial limits of Chicago are Chicago parks, maintained for the use and benefit of Chicago inhabitants, and are frequented by the people of Chicago, in whose safety the city is concerned. Our understanding is that

the Chicago Park District does not have a building code and exercises only such authority as has been delegated to it by the legislative act creating the district. The district has not been delegated police power concerning the construction of buildings, the prevention of fires, or the making safe of dangerous constructions. On the other hand the legislature has conferred upon cities, villages and incorporated towns express power to regulate buildings prescribe fire protective measures, and to provide for the inspection of elevators. (Sections 23-70, 23-71, 23-72, 23-73, 23-75, Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes.) Such powers expressly delegated to the city have not been withdrawn by the Chicago Park District act, but in our judgment may be exercised over buildings, and elevators in buildings, located on land of the Chicago Park District, another municipal corporation whose territory is wholly contained within that of the City of Chicago.

This conclusion is fortified by the decision of the Supreme Court of Illinois in the case of *County of Cook v. City of Chicago* (1924), 311 Ill. 234, wherein it was held that the police power delegated to cities, villages and incorporated towns, which includes the regulation of buildings, extends to all buildings within the city limits and that the provisions of Chicago's building code were enforceable against the County of Cook in the matter of the construction of a public building erected by the County. In its opinion the court said (p. 247):

"We are of the opinion that the police power delegated to the city must be construed, as between the county and the city, as a delegation of a power to the latter which the former is expected to observe. * * * We are of the opinion that in enacting paragraph 63 of article 5 of the Cities and Villages act, and in using the language, 'and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or *other municipalities located therein.*" (Italics ours.)

The italicized words of the above excerpt are important as showing that the court did not limit its decision to quasi public corporations, such as a county, but included "other municipal corporations" located in the city.

In an opinion given the Commissioner of Streets and Electricity December 2, 1937 (Opinions of the Corporation Counsel, Volume XIX, page 73) the Chicago Park District act was examined by us and the view expressed that while the Chicago Park District may have exclusive jurisdiction over the installation of lights and electrical equipment in parks for park purposes, the Park District had no police power over the construction of buildings, and the city was authorized to enforce its ordinances with regard to the installation of electrical equipment in buildings erected in the parks.

This department has given many other opinions to the same effect. In one rendered the Board of Examiners of Stationary Engineers March 30, 1935 (Opinions of the Corporation Counsel, Volume XVIII, p. 35), it was decided that the city's police ordinances, which do not interfere with the exercise of the Chicago Park District's powers, may be enforced by the city in territory under the control of the district within the city limits, and that stationary engineers employed by the Chicago Park District or in territory under the control of the District within the city limits are subject to the ordinances of the city regulating the examination and licensing of such engineers.

In an opinion given the City Sealer August 8, 1935 (Opinions of the Corporation Counsel, Volume XVIII, p. 39), we held that the city had the

right to inspect weighing machines, used by the public in the parks and expressed the general view that the mere fact that the Chicago Park District is a separate municipal corporation does not exclude the park areas under its control from the jurisdiction of the city in the exercise of any police power expressly delegated to the city and not delegated to the Park District.

See also earlier opinions to the same effect given the World's Fair Committee December 23, 1930 (Volume XVIII, page 39), the Commissioner of Public Works January 14, 1925 (Volume XIII, page 656), and the Commissioner of Buildings October 26, 1905 (Volume III, page 158).

While the alleged conflict was between the city and a railroad which claimed to be under the exclusive control of the Commerce Commission, and therefore not strictly parallel to the instant matter, the case of *City of Chicago v. Alton Railroad Company* (1934), 355 Ill. 65, is enlightening. There the city's power to regulate and inspect elevators in buildings owned and used by the railroad in Chicago was upheld. In its opinion the court said (p. 74):

"To effectually carry out the purpose of the Public Utilities act does not require us to hold that the Commerce Commission shall regulate buildings used or to be used in the future by the railroad, or the elevators now in use by it, or to further hold that by implication these regulatory powers were repealed and withdrawn from the city. There is no overlapping of authority. There is nothing repugnant in permitting the city to continue to exercise its police powers for the safety of the public against fire and other hazards in the one case, and from imperfect and faulty construction or maintenance of elevators in the other case. This will not interfere with full supervision by the Commerce Commission of public utility service or tend to defeat the purpose of the act."

Applying the analogy of the decision in the *Alton Railroad* case and paraphrasing the court's opinion, it may properly be said here that to effectually carry out the purpose of the Chicago Park District act would not require any court to hold that the Chicago Park District has exclusive power over buildings within its territory, or over elevators in such buildings, or to further hold that by implication regulatory powers were repealed and withdrawn from the city. There is nothing repugnant in permitting the city to exercise its police powers for the safety of the public against imperfect construction and faulty operation of elevators used by inhabitants of the city and the control and maintenance of public parks and boulevards by the Park District. For the city to enforce the provisions of its building ordinances and regulations for the safe operation of elevators within buildings, will not interfere with the proper functions of the Park District or tend to defeat the purpose of the Chicago Park District act.

When salutary regulations designed to protect life and limb of Chicago's inhabitants and its guests are concerned it is not easily understood by us why the officials in charge of the Museum of Science and Industry should object to elevator inspections by the inspectors of your department. It would seem that in this matter perfect comity and accord should exist between the city and the district and that full cooperation should be given in observing the city's building ordinances and elevator inspection regulations. Perhaps if you were to confer with the District authorities, or furnish them with a copy of this opinion (carbon copy forwarded herewith), the objection of the Museum might be withdrawn and the matter amicably adjusted.

SUPPRESSING OBSCENE LITERATURE

(No. 10966—Commissioner of Police—A. A. P.—May 23, 1947.)

The circulation of the publications "Wink", "Titter", "Beauty Parade", "Bits of Beauty", and "Cartoon—Humor", can be suppressed under the provisions of the State Statute prohibiting the circulation of literature or pamphlets of an obscene nature.

Citation: IRS '45, Ch. 38, 468.

Ordinance: Mun. Code, 192-9.

Cases: 19 Fed. 497.

38 Fed. 500.

OPINION OF FOREGOING SYNOPSIS

We have your letter of May 6th together with report by Capt. John L. Sullivan, Commanding Officer of the 35th District with copies of the following publications:

"WINK"—"A fresh magazine."

"TITTER"—"America's merriest magazine."

"BEAUTY PARADE"—"The world's loveliest girls."

"BITS OF BEAUTY."

"CARTOON—HUMOR."

"SEE."

"THE NATIONAL POLICE GAZETTE."

You request our opinion "on the legality of these magazines."

Paragraph 468, Chap. 38, Ill. Rev. Stat. 1945 is as follows:

"468. Circulating.) § 223. Whoever brings, or causes to be brought into this state, for sale or exhibition, or shall sell or offer to sell, or shall give away or offer to give away, or have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, instrument or article of indecent or immoral use, or shall advertise the same for sale, or write or cause to be written, or print or cause to be printed, any circular, handbill, card, book, pamphlet, advertisement or notice of any kind, or shall give information orally, stating when, how, or of whom, or by what means any of the said indecent and obscene articles and things hereinbefore mentioned can be purchased or otherwise obtained, or shall manufacture, draw and expose, or draw with intent to sell, or to have sold, or print any such articles, shall be confined in the county jail not more than six months, or be fined not less than \$100 nor more than \$1,000 for each offense—one-half of said fine to be paid to the informer upon whose evidence the person so offending shall be convicted and one-half to the school fund of the county in which the said conviction is obtained."

Section 192-9 of the Municipal Code of Chicago is as follows:

"192-9. It shall be unlawful for any person to exhibit, sell, offer to sell, circulate or distribute any indecent or lewd book, picture, or other thing of an immoral or scandalous nature, or exhibit in any place where the same can be seen from the public way, or in a public place frequented by children, any picture representing a person in a nude state which is not connected with any art or educational exhibition, or exhibit or perform any indecent, immoral, or lewd play or other repre-

sensation. Any person violating any provisions of this section shall be fined not less than twenty dollars nor more than one hundred dollars for each offense."

As a general rule the courts are disinclined to limit or in any way restrict the freedom of the press but when a publication contains text, pictures or illustrations which tend to corrupt the mind or undermine the morals of persons to whom such publications are made available, the police department can suppress the sale or distribution of such publications.

If it is claimed that the publications in question have artistic value then their circulation should be limited to students in such art. If on the other hand the publications are offered for sale at book stores, news stands or other public places which are frequented by young and immature persons the effect will be to deprave and corrupt their minds and undermine their morals.

The publication of medical books treating the human body and its ailments may be circulated among members of the medical or other professions which have a scientific interest in the subject treated but their circulation among persons outside of the professions may constitute the books as "unmailable matter" and such circulation may be suppressed.

In the case of *United States v. Clarke*, 38 Federal Reporter, page 500, involving the circulation of "Dr. Clarke's treatise on nervous and special diseases" and other related subjects the court, in discussing the subject matter said (page 501):

"* * * The publication complained of was exhibited to the court, and contrasted with a certain standard medical journal, and much was said on the point whether the publication was obscene in the sense of the common law, and whether common-law tests of obscenity are applicable to the case, and as to whether the nonmailable character of the publication depends to any extent upon the person, or class of persons, to whom it was addressed. In view of the discussion at the hearing of the demurrer, and the fact that the case remains to be tried, it will not be out of place to express an opinion on some of these points. In the first place, I remark that the words 'obscene,' 'lewd,' 'lascivious,' and 'indecent,' as used in the federal statute, section 3893, as amended by act Sept. 26, 1888, (25th St. at Large, p. 496,) have the meaning that have been imputed to them at common law in prosecutions for publishing obscene libels. Whether a particular publication is obscene, and for that reason unmailable, must be determined by common-law tests. At this point, however, arises the question whether it is the province of the court or jury to determine with respect to a given publication if it is obscene or otherwise. I am of the opinion that the ultimate solution of that question rests with the jury to the same extent that in civil prosecutions for libel, and in criminal prosecutions since the declaratory act of the 32 Geo. III. c. 60, the question whether an article is libelous is for the jury, under proper directions given by the court."

The court further said, (page 502):

"* * * It was urged that the court ought at least to presume from an inspection of the pamphlet that the author's motives were laudable; that his purpose was to benefit, rather than to debauch, the public. But, even conceding this to be so, it will not benefit the defendant, if his pamphlet is found to be in fact indecent or obscene, as it was expressly held in the somewhat celebrated case of *Queen v. Hicklin*, L. R. 3 Q. B. 371, that the character of a publication as obscene or otherwise is not to be determined by the motives of the author in making the publication. In the case of *U. S. v. Chesman*, 19 Fed. Rep. 497, Judge McCrary said:"

"There are many things contained in the standard works, (upon medicine,) which, if printed in pamphlet form, and spread broadcast among the community, being sent through the mail to persons of all classes, including boys and girls, would be highly indecent and obscene."

"A very similar remark was made by Cockburn, C. J., in *Queen v. Hicklin*, L. R. 3 Q. B. 367 *supra*. I do not understand from this language, however, that the character of a publication, whether obscene or otherwise, is to be determined by other *criteria* than its subject-matter, the method of treatment of the subject involved, the illustrations it contains, and its tendency, in all these respects, to corrupt those whose minds are open to immoral influences."

While it may be argued that the publications "WINK," "TITTER," "BEAUTY PARADE," "BITS OF BEAUTY" and "CARTOON—HUMOR" are devoted to art and literature, a casual perusal of these publications will clearly show that both the text and pictures are so arranged and so presented that they are morally improper and not for the public welfare and the public good. When objectionable language and pictures of uncertain artistic value occur in isolated instances they may not, in a technical sense, be called obscene but they nevertheless have dangerous tendencies and malignant qualities but in the publications last mentioned, pictures and descriptions become a dominant and systematic feature and it cannot be said that they are for the public good. See *Hannegan v. Esquire, Inc.*, 90 U. S., p 146 Law. Ed.

It is therefore our opinion that the circulation of the publications "WINK," "TITTER," "BEAUTY PARADE," "BITS OF BEAUTY" and "CARTOON—HUMOR" can be suppressed under the provisions of the Revised Statute of the State of Illinois and the Municipal Code of Chicago hereinabove quoted.

WELFARE TREATMENT

(No. 10992—Commissioner of Welfare—F. V. M.—August 26, 1947.)

The Commissioner of Welfare is without authority to extend to residents of Chicago who are not paupers the treatment facilities for alcoholics at Portal House notwithstanding the fact that they are willing to pay for such treatment.

Citation: Municipal Code, 21-5, 21-6.

OPINION OF FOREGOING SYNOPSIS

In your letter of August 13th, you ask for an opinion as to whether the City of Chicago, Department of Welfare, can lawfully offer its treatment facilities for alcoholics at Portal House to residents of Chicago who are not paupers but have expressed a desire to pay for such treatment.

In your subsequent letter of August 17, 1947 you explain that Portal House was opened by the Department of Welfare on June 16, 1947 as a center for the treatment of alcoholism and as part of the Department's

medical care program for the rehabilitation of indigent and dependent persons. You state further that its sole purpose is to attempt to restore to normal productivity persons on relief whose inability to hold jobs in the community is due to alcoholism and that the enterprise is in line with the Department's established principle of conserving taxpayers' dollars by removing whenever possible the cause of the dependency.

The overseer of the poor (in Chicago Commission of Welfare) has only such authority as is granted him by the statutes of the State of Illinois and poor and indigent persons only are entitled to the relief provided by such statutes.

We quote the following:

AN ACT to revise the law in relation to paupers
(Approved March 23, 1874, R. S. 1874, p. 754.)

1. WHO LIABLE TO SUPPORT.) § 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they, or either of them, be of sufficient ability: Provided, that when any persons become paupers from intemperance, or other bad conduct, they shall not be entitled to support from any relation, except parent or child.

S. H. A. 107, § 1: J. A. 98.01.

14a. SUPPORT BY MUNICIPALITIES OF OVER 500,000 POPULATION.) § 14a. Cities, villages and incorporated towns, having a population of more than 500,000 inhabitants, and all incorporated towns which have superseded civil townships, shall relieve and support all poor and indigent persons lawfully resident therein except as herein otherwise provided. (As amended by act approved Dec. 11, 1936. L-1935-36, Second sp. Sess., p. 78.)

S. H. A. 107, § 14a: J. A. 98.14 (1).

17a. OVERSEER OF THE POOR OR LIKE OFFICER AND EMPLOYEES IN CITIES, VILLAGES AND TOWNS OVER 500,000—COMPENSATION—BOND—POWERS AND DUTIES—DEFAULT AND MISAPPROPRIATION OF FUNDS.) § 17a. In cities, villages and incorporated towns having a population of more than 500,000 inhabitants the city council or board of trustees, as the case may be, shall provide by ordinance for the appointment of an overseer of the poor or like officer and for such other employees and assistants as may be necessary to properly relieve and support the poor and indigent persons lawfully resident therein. The compensation of such overseer or officer shall be fixed by the city council or board of trustees and the compensation of such other employees and assistants shall be fixed by such overseer or officer subject to the approval of such city council or board of trustees. Such overseer or officer shall have the care and oversight of such poor and indigent persons as are not supported by their relatives or at the county home and shall see that they are suitably relieved, supported and employed, subject to such restrictions and regulations as may be prescribed by the city council or board of trustees, as the case may be.

In accordance with the foregoing section of the statute, in the City of Chicago such relief is to be administered by the Commissioner of Welfare under rules and regulations adopted by the City Council.

We quote the following:

"Sections 21-5 and 21-6 of the Municipal Code."

"21-5. There is hereby created the office of Commissioner of Welfare. He shall be appointed by the mayor, by and with the advice and consent of the city council." (Amend. Coun. J. 6-3-42, p. 7105; 4-5-46, p. 5544.)

"21-6. The commissioner shall have the care and oversight of such poor and indigent persons as are not supported by their relatives or by the county, and shall see that they are suitably relieved, supported and employed, subject to such restrictions and regulations as may be prescribed by the city council. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commissioner. It shall be the duty of the commissioner to carefully investigate all applications for relief and to grant relief only in cases of actual need and to such poor and indigent persons as are legally entitled to relief." (Amend. Coun. J. 6-3-42, p. 7105.)

You will note that Section 21-6 limits the distribution of relief to "such poor and indigent persons as are not supported by their relatives or by the County." In view of all of the foregoing we are of the opinion that you are without authority to extend to residents of Chicago who are not paupers the treatment facilities for alcoholics at Portal House notwithstanding the fact that they are willing to pay for such treatment.

DEPRIVING TENANTS OF WATER

(No. 10997—Commissioner, Public Works—A. F. G.—September 15, 1947.)

While a tenant is in lawful possession the landlord has no right to deprive tenants of services which the ordinances require him to furnish, particularly a service so essential to health and welfare as water.

Citations: Municipal Code, 39-7, 48-66, 82-12, 82-113, 82-117, 96-7, 96-17.

OPINION OF FOREGOING SYNOPSIS

Have your letter of August 12, 1947 which is as follows:

"The attorney for one of the tenants in a building in Chicago complained to the Mayor's Office that the water had been turned off at that address by the owner who is attempting to eject some of his tenants. The attorney said there are some children in the apartments.

"We find nothing in the ordinances which permits or prohibits an owner from turning off the water. We have permitted an owner to turn off water in buildings that are vacant.

"It occurs to me that the turning off of water in an apartment building is liable to create a nuisance or a health hazard. There are provisions in the building code which require water for inhabited

buildings. I have chatted with the Health Department and they inform me that all of the sanitary and other inspectors which would look after health hazards and nuisances, so far as water is concerned, have been transferred from the Health Department to the Building Department, and they have no facilities for handling a case of the kind above outlined. Consequently, may I ask what rights an owner of a building has to turn off the water to evict tenants?

"What authority this Department has in such an action?

"What authority this Department has to prevent action which may create a nuisance or a health hazard by the turning off of water by the owner of an occupied building?

"What authority this Department has to prevent action which may create a nuisance or a health hazard by the blocking of a sewer?"

The following sections of the code are applicable to the matter referred to in your letter.

"39-7. Every building or structure constructed or maintained in violation of the building provisions of this code, or which is in an unsanitary condition * * * or which in any manner endangers the health or safety of any person or persons is hereby declared to be a public nuisance. * * *

"48-66. Every dwelling shall have access to at least one lavatory, one bath tub or shower and one water closet. Every family dwelling within an apartment house, apartment hotel, or tenement house hereafter erected shall contain within the enclosing walls of such dwelling not less than one lavatory or sink, one bath tub or shower and one water closet. * * *

"96-7. Every tenement or lodging hereafter erected or converted shall * * * have water furnished at one or more places in such house or in the yard thereof, so that the same may be adequate and reasonably convenient for the use of the occupants thereof; * * *

"96-17. Every person who shall be the owner, lessee, keeper or manager of any tenement house shall provide or cause to be provided for the accommodation thereof and for the use of the tenants, lodgers or boarders therein, adequate privies, urinals and water closets as is required by the building regulations of this code. * * *

"82-12. Every new and existing dwelling or place of employment located on a lot abutting on a public way, granted easement, or thoroughfare in which a public sewer is available, shall be provided with a plumbing system, including water closet facilities connected to such sewer."

"82-113. Plumbing fixtures and equipment shall be provided in every building for human habitation as required by the building provisions of this code."

"82-117. Every water closet or other plumbing fixture or appliance designed to be cleansed by flushing with water shall, at each flush be supplied with sufficient quantity of water to remove quickly all waste matter and properly cleanse the interior surfaces exposed to atmosphere. * * *

From the foregoing sections it would appear to have been the intention of the city council to require water to be furnished to all required plumbing fixtures. Even in those sections where no express requirement

for water is made, such requirement is implied. When the council required sinks, water closets and other fixtures to be installed in buildings, it was plainly the intent to have them furnished with water as such fixtures without water are useless.

We do not believe the owner of a building has any legal right to turn off water from an apartment for the purpose of compelling the occupant to move. If the owner wants possession the law provides a method by which he can secure possession. While the tenant is in lawful possession the landlord has no right to deprive tenants of services which the ordinances require him to furnish, particularly a service so essential to health and welfare as water.

The enforcement of the plumbing and sanitary requirements of the code is in the department of buildings and your department has no authority in such case even if turning off water may create a nuisance or health hazard as such authority is in another department.

If the sewer blocked is one under your jurisdiction you have the authority to prevent such action but not otherwise.

INSPECTING "BOTTLED GAS PLANTS"

(No. 11007—Chairman, Finance Committee—M. H. F.—November 14, 1947.)

The City has the power to inspect plants and facilities used for the production of or utilizing bottled gas.

Citations:

Statute:	IRS '45, Ch. 24, 23-75.
Ordinance:	Municipal Code, 90-36.
Cases:	323 Ill. 368.
	348 Ill. 294.
	355 Ill. 65.
	374 Ill. 384.

OPINION OF FOREGOING SYNOPSIS

Your communication of November 10, 1947 requests our opinion as to whether the city has power to inspect plants and other facilities within the city, used for the production or utilization of bottled gas for cooking and heating purposes.

We have been informed by the Fire Marshal in Charge of the Bureau of Fire Prevention that bottled gas is a petroleum product, in liquid form under pressure; that when released it forms a gas which is highly volatile, inflammable and explosive. The gas is invisible and odorless, unless treated with an odorant. It is two and one-half times heavier than air, and its flash point is extremely low.

By statute the city has been granted broad powers to regulate the handling of combustible and explosive material. By section 23-75 of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, express power has been granted it to regulate the storage of a number of

specifically mentioned combustibles, including petroleum, and any of their products, and other similar combustible or explosive material; also to regulate and prevent the use of combustible liquids in buildings.

A wide variety of ordinances have been enacted in the exercise of this grant of power and their validity sustained in the courts. Among these are ordinances regulating and licensing dry cleaners, gasoline filling stations and cosmetic manufacturers. *Klever Karpel Kleaners v. City of Chicago*, (1926), 323 Ill. 368; *Fligelman v. City of Chicago*, (1932), 348 Ill. 294; *Chicago Cosmetic Co. v. City of Chicago*, (1940), 374 Ill. 384.

Inspection as a reasonable means of carrying into effect the regulatory power. *City of Chicago v. Alton R.R. Co.*, (1944), 355 Ill. 65.

Bottled gas used for cooking and heating purposes being a combustible and explosive material, and the city being empowered to regulate and prevent the storage and use of such combustible materials, our opinion is that the city has the power to inspect plants and facilities used for the production or utilization of such gas.

Section 90-36 of the Municipal Code of Chicago contains regulations applicable to the installation and operation of compressed or liquefied gas system for lighting or cooking. The section, however, states that the regulations are not intended to apply to plants devoted to the manufacture and compression of the gases utilized in these systems.

CIGARETTE SALES NEAR SCHOOLS

(No. 11050—City Collector—M. H. F.—April 20, 1948.)

The provision in the Municipal Code prohibiting the sale of cigarettes within 100 feet of any school is interpreted to apply to the area within 100 feet of the school building and not the school grounds.

Citation: Municipal Code, 178-18 (as amended December 12, 1947).

OPINION OF FOREGOING SYNOPSIS

Your letter of April 14, 1948 informs us that the Chicago Consumers Cooperative, Inc. filed an application for a license to sell cigarettes, which application when referred to the Commissioner of Police for an investigation was returned disapproved, the Commissioner reporting that the location was "approximately 75 feet from the grounds of the Jenner Grade School and about 250 feet from the school buildings." Our opinion is requested as to how measurements should be taken to conform with section 178-18 of the Municipal Code of Chicago, as amended December 12, 1947.

The section, as amended December 12, 1947 (C. J. page 1341) reads as follows.

"No person shall sell, give away, barter, exchange, or otherwise deal in at any place located within one hundred feet of any building used exclusively for school purposes, any cigarettes, tobacco, or tobacco products of any form whatsoever used in the making of cigarettes or with which cigarette papers or wrappers are sold or given away."

If the section had read "within 100 feet of any school" our opinion would be that the school grounds, as well as the school building, would be within the protection. However, as the language used is "within 100 feet of any building used exclusively for school purposes" our opinion is that the plain provision of the ordinance may not be enlarged by construction to include more than school buildings. Hence, if the premises of the applicant in question are located a greater distance from every building of the Jenner Grade School than 100 feet then the application for license should not have been disapproved because of the prohibition contained in the section.

USED CAR LOTS

(No. 11053—A. F. G.—April 28, 1948.)

A used car dealer is not required to obtain sticker emblems for cars displayed for sale.

Citation: Municipal Code, 27-85.

OPINION OF FOREGOING SYNOPSIS

In your letter of April 10, 1948 you refer to our letter of March 25, 1948 re safety stickers on motor vehicles owned by used car dealers. In our letter we said:

"It is our opinion that such cars are not required to display the safety sticker while on the lot or in the garage of the owner, but must do so when operated on the public ways. The offense under the ordinance is not the ownership of a noncomplying vehicle but its operation on the streets of the City. (Section 27-85 Municipal Code.)"

You now ask if stickers are required on said vehicles if they are used for the purpose of demonstration. Assuming in making demonstration the cars are driven on the public ways, we are of the opinion they would require safety stickers. Section 27-85 of the code is as follows:

"27-85. It shall be unlawful for any person to operate, cause or permit to be operated upon any public way in the city any motor vehicle owned by a resident of the city or by a corporation having its principal office or place of business in the city without having displayed on the windshield of such motor vehicle a valid certificate of inspection. Each day such motor vehicle is so operated shall constitute a separate offense."

In your second question you ask if in our opinion there is anything in the law which places a duty or responsibility on the used car dealer to make certain that every automobile he sells to a customer will pass through the safety lane successfully? The ordinance does not require the dealer to make such guaranty, but we think the ordinance should prohibit the sale of used cars unless such cars have displayed thereon current safety stickers. Safety stickers are issued without fee and in our opinion reputable organizations like yours should favor such a reasonable regulation, not only for public safety but also for self interest. When irresponsible used car dealers, without any regulation, can sell cars like the one which recently killed a high school student, the entire business suffers.

We have prepared and shall submit to the city council draft of an amendment to chapter 27 of the Municipal Code, which would make it unlawful to sell, offer for sale, or display for the purpose of selling, any used motor vehicle unless such vehicle shall have attached to the windshield a current certificate of inspection. There is little doubt the city council will enact this proposed ordinance, as in an ordinance later declared invalid by the Supreme Court for other reasons, such a provision was included. Unless the business accepts such a regulation which adds nothing to the cost of doing business, more drastic regulation might ensue. We transmit copy of said draft.

MINOR'S ESTATE

(No. 11080—Commissioner of Welfare—F. T. M.—October 11, 1948.)

Matters pertaining to a minor's estate, such as settlement of a personal injury suit and disbursement of funds is required to be done under direction of the Probate Court.

Citation: IRS '47, Ch. 23, Sec. 218.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your letter of September 28, 1948, requesting our opinion as to whether the Commissioner of Public Welfare having been previously appointed guardian of certain dependent minors by the Juvenile Court of Cook County, has by virtue of such appointment, authority to pursue and accept sums of money to which the minors are entitled for the purpose of applying such sums for their care and maintenance.

Section 218, chapter 23, see Revised Statutes, 1947, referring to the act relating to neglected and delinquent children provides as follows:

"Nothing in this act shall be construed to give the guardian appointed under this act the guardianship of the estate of the minor or to change the age of minority for any other purpose except the custody of the child."

The guardianship created by the Juvenile Court is of the person of the minor for the purposes of care, training and education, and specifically provides that such appointment is not to be construed as a guardianship of the minor's estate.

The Probate Act provides that the guardian of the estate of a minor shall have, under the direction of the court, the care, management and investment of the minor's estate and shall manage the estate of his ward frugally. Disbursements from the minor's estate are to be made only when approved by the Probate Court. It is our opinion that matters pertaining to the minor's estate, such as settlement of a personal injury suit and disbursement of funds is required to be done under direction of the Probate Court and that an estate should be opened to properly protect all interested parties.

SMOKING ORDINANCE

(No. 11082—Chairman, Committee on Buildings and Zoning—S. R. D.
—November 17, 1948.)

An ordinance prohibiting smoking in public elevators and retail stores employing more than fifteen persons would be a valid exercise of the City's police power.

Citations:

Statute: IRS '47, Ch. 24, par. 23.

Cases: 177 U. S. 183.

176 Ill. 340.

262 Ill. 510, 512.

393 Ill. 246.

OPINION OF FOREGOING SYNOPSIS

We acknowledge receipt of your letter dated November 10, 1948 attaching a copy of a proposed ordinance providing that it shall be unlawful for any person to smoke or carry a lighted cigarette, cigar or pipe in a retail store. You request us to re-draft this ordinance in proper form, without any change in the substance, and to advise the committee whether the ordinance would be valid if passed.

We transmit herewith a proposed ordinance providing that it shall be unlawful for any person to smoke or carry a lighted cigarette, cigar or pipe in any public elevator or in any retail store in which more than fifteen persons are employed, excluding areas set apart for serving food or beverages, waiting and rest rooms, executive offices, beauty parlors and other rooms or areas where merchandise is not exposed. It is our opinion that such an ordinance would be valid.

Under Article 23 of the Cities and Villages Act (1947, Ill. Rev. Stat., chap. 24, par. 23) municipalities are given the following powers:

"23-72. To regulate fire hazards."

"23-81. To do all acts and make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.

"23-105. To pass and enforce all necessary police ordinances."

In *Gundling v. City of Chicago*, 176 Ill. 340, affirmed in 177 U. S. 183, the validity of an ordinance prohibiting the sale of cigarettes near school houses and providing for a license to sell the same in other places was involved. The court held the ordinance valid on the basis of the general police power of the city to protect the health of the public.

In *City of Zion v. Behrens*, 262 Ill. 510, the Supreme Court of our State struck down an ordinance prohibiting smoking on the public streets and alleys and in public places because the ordinance was obviously an attempt to regulate the habits of the people and was not designed to protect their health or the property of the city from damage by fire.

At page 511-512 the court said:

"* * * Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that

power exists to prohibit smoking in certain public places, such as street cars, theatres, and like places where large numbers of person are crowded together in a small space."

In *Fr. Basil's Lodge v. City of Chicago*, 393 Ill. 246, and in many other cases preceding that, our Supreme Court has repeatedly declared that the authority for the passage of an ordinance need not be wholly derived from a single grant of power by the legislature but may be derived from several different grants of power.

We have drafted the ordinance on the basis of the foregoing decisions of our Supreme Court with a finding by the City Council that crowds are attracted to large retail stores and smoking in public elevators and places where merchandise is exposed is a menace to public health, safety and property. We believe that the ordinance as drafted can be sustained as a reasonable exercise of the police power of the city delegated to it by the State and that the class affected by the proposed ordinance, i.e., public elevators and retail stores in which more than fifteen persons are employed bears a reasonable relation to the purpose sought to be accomplished by the ordinance, in that it applies to places which attract a large number of persons within a relatively small area. Such an ordinance our Supreme Court indicated in the *Zion City* case would be valid.

CHAPTER VI — LICENSES AND PERMITS

A. LIQUOR LICENSE

LICENSE DEPOSIT RECEIPTS

(No. 10895—Commissioner of Police—M. H. F.—March 29, 1946.)

Where a person engaged in a business subject to license has filed an application for a license and paid the required fee and received only a receipt therefor, it is the duty of the bureau of license to ascertain the reason why the license has not been issued. If it is because of failure to comply with any health provision, fire prevention provision, building provision or any other provision of the code relating to the premises or the eligibility of the person for a license, the bureau should advise the head of the department having control of the subject matter so that he may enforce the pertinent provision of the code and in case the violation is serious, close the business.

Ordinances: Municipal Code, 7-11, 101-5, 104-24 to 104-32.

OPINION OF FOREGOING SYNOPSIS

Your communication of March 26, 1946 forwards an article from a city newspaper with reference to the alleged operation of unlicensed cabarets, taverns, etc. on a deposit receipt which the city collector issues upon payment of a deposit for a license. Our opinion is requested upon the following question:

"If the Fire, Health, Building, Electrical, or other Department of the City of Chicago, disapprove the license application, is it the function of this Department or of the License Enforcement Bureau, to prevent the operation of the applicant's business, notwithstanding the fact that the City Collector has issued a license-deposit receipt to the operator? And is it the duty of the departments involved to notify this Department or the License Enforcement Bureau, of the disapproval of such license?"

Generally speaking all city license ordinances provide that it shall be unlawful to engage in the occupation or conduct a business made subject to license without first procuring a license so to do and paying the prescribed license fee. The mere filing of an application for a license and the deposit of the prescribed license fee confers no right upon the applicant to engage in a business which is subject to license. In fact the receipt given the applicant by the city collector for the deposit of the license fee expressly states on its face that it is not a license and that it confers no right to engage in business.

So far as we know it has not been the policy of the city to permit any retail liquor establishment to operate and engage in the dispensing of alcoholic liquor until a license has been first procured.

Some liquor dispensing establishments are, however, not merely taverns but because of the fact that they come within the purview of the city's cabaret or public places of amusement license ordinance (Sections 104-24 to 104-32, inclusive, Municipal Code of Chicago), they are also subject to license and regulation under that ordinance. Public places of amusement are required to comply with the applicable provisions of the Municipal Code regulating buildings, health, and fire prevention. Until an application for a public place of amusement license is approved by the commissioner of buildings, the president of the board of health and the division marshal in charge of fire prevention a license, of course, does not issue. The places referred to in the Chicago Times article are doubtless places the proprietors of which hold liquor license but for which public places of amusement licenses have not been issued due to the fact that the premises do not comply with all of the requirements of the buildings, health and fire prevention chapters of the code, and due to noncompliance the applications for public places of amusement licenses have not been approved by the respective department or bureau heads. Quite likely the proprietors have applied for amusement licenses and deposited with the city collector the prescribed license fees. Until they actually procure amusement licenses they are, of course, not legally entitled to operate as public places of amusement.

So far as liquor licenses are concerned our opinion is that no person is authorized to dispense alcoholic liquor until he is the holder of a license granting him this privilege. We are also of the opinion that inasmuch as the department of police is vested with the enforcement of the city's retail liquor dealers ordinance, it is your duty to take the necessary action to prevent the sale at retail of alcoholic liquor within the city except under appropriate license.

Relative to the matter of taking action to prevent the operation of public places of amusement our opinion is that the responsibility rests with the department or departments charged with the enforcement of particular provisions of the Municipal Code, such as building ordinances, health provisions, and fire prevention regulations. In other words the department or bureau whose ordinance is being violated is in our opinion charged with the duty of enforcing compliance. Where more than one department is concerned coordination between departments would seem not only desirable but imperative. Repeatedly we have expressed the view that it will not suffice for a department or bureau whose ordinances are being violated merely to disapprove an application for license and then not follow through and initiate the necessary action to compel compliance or to close a nonconforming establishment.

There is some ambiguity in the different sections of the Municipal Code concerning the matter last discussed. Section 101-28 gives the city collector police powers to enforce the licensing provisions of the code. The section also makes it the duty of the bureau of license, acting under the jurisdiction and control of the city comptroller, to examine all persons and places of business subject to license for the purpose of ascertaining whether or not licenses have been procured, and in case of the neglect or refusal of any person to procure a license, the comptroller is given the authority and duty to take such action as he deems necessary to enforce the license requirements. Further the same section states that it shall be the duty of the head of the department or board charged with the enforcement of any licensing provision of the code to take such action as shall be necessary to compel compliance with said provision.

By section 101-5, which covers the matter of investigations to be made by any department or board of the city preliminary to approval of applications for licenses, it is expressly provided that if any department head or president of a board shall disapprove an application and the appli-

cant for license shall be in business or shall have engaged in the occupation for which a license is sought, it shall be the duty of such department head or president of the board to take such action as shall be necessary to compel compliance with the provisions of the code.

Since the organization of the license department and its successor agency the bureau of license, functioning under the city comptroller, it has not been the practice of the city collector to engage in the active work of enforcing license ordinances.

By section 7-11, which establishes the bureau of license, such bureau is charged with the duty of making investigations for the purpose of determining whether all persons required by the provisions of the code to take out licenses have complied with such provisions and have from time to time procured the same as required by law, and in all cases of evasion of payment or neglect to observe such license provisions, the section provides that the comptroller shall serve notices of delinquency and institute proceedings for the collection of same, subject to the directions of the corporation counsel.

In cases when the person engaged in a business subject to license has filed an application for a license and deposited the prescribed license fee it is doubtful if proceedings to enforce the license provisions would be successful. We believe that in such cases the duty of the bureau of license is to investigate the reason why the license has not been issued and if it is because of failure to comply with any health provision, fire prevention provision, building provision or any other provision of the code relating to the premises or the eligibility of the person for a license, to advise the head of the department having control of the subject matter so that he may enforce the pertinent provision of the code and in case the violation is serious close the business.

Upon the question of policy in summarily closing for minor violations of the code noncomplying establishments whose proprietors have deposited license fees we do not feel called upon by your inquiry to express an opinion.

Copies of this opinion are being furnished to the city comptroller, the president of the board of health, the commissioner of buildings, the commissioner of streets and electricity, the city collector, and the division marshal in charge of fire prevention.

LICENSE OF SUCCESSOR OWNER

(No. 10896—City Collector—M. H. F.—April 11, 1946.)

It would not be improper to issue a City retailers' license for a tavern to a duly qualified applicant who is the immediate successor of the former licensee, where the tavern has been operated continuously at the same location for twelve years, and where in the past year the Salvation Army has established a church within 100 feet of the tavern.

Citations:

Statutes: IRS '45, Ch. 43, Art. VI, Sec. 8 (Illinois Liquor Control Act).
Amended 1945 Session, General Assembly.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date cites the case of a retail liquor establishment located in the city, which has been operated continuously under city and state licenses by the same licensee since June 5, 1934. The current license is for the period ending April 30, 1946. You state that sometime in January, 1946, the Salvation Army established a church within 100 feet from the licensed premises. The licensee is contemplating the sale of his business, provided the purchaser is not prevented from obtaining a retailers license for the premises referred to. Inviting our attention to Section 8 of Article VI of the Illinois Liquor Control Law, Chapter 43, Illinois Revised Statutes, 1945, you request our opinion as to whether a city retailers liquor license may be issued for the premises to a person immediately succeeding the present licensee, provided that all other requirements of the statute and city ordinances pertaining to the sale of alcoholic liquor at retail are met by the applicant for license.

The above mentioned section of the Liquor Control Law was amended at the 1945 session of the General Assembly. The portion of the section material to your inquiry, with the amendment italicized, now reads as follows:

"No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children, or any military or naval station; provided, that this prohibition shall not apply to hotels offering restaurant service, regularly organized clubs, or to restaurants, food shops or other places where sale of alcoholic liquors is not the principal business carried on, if such place of business so exempted shall have been established for such purposes prior to the taking effect of this Act; nor to the renewal of a license for the sale at retail of alcoholic liquor on premises within 100 feet of any church where such church has been established within such 100 feet since the issuance of the original license."

Obviously, the legislature intended by the amendment to prevent the dislocation of a duly licensed retail liquor establishment which had been established at a particular location prior to the establishment of a church within the 100 feet prohibited area. The licensed sale of alcoholic liquor being recognized as a lawful business by the statutory law of the State, manifestly it was the purpose of the legislature when amending the section to clarify what had theretofore been a controversial question, whether a tavern or retail liquor establishment, which had been properly located at the time it was originally licensed, might be uprooted by the voluntary establishment of a church within 100 feet of it. It would seem fair to assume that the legislative body took into consideration the otherwise insecurity of a license and established business and the possible pecuniary loss and damage to a proprietor who had made financial outlays in the acquisition of premises by purchase or lease, the possible construction of a building, the installation of fixtures and stock of merchandise, as well as acquired patronage, and was unwilling to permit through a possible construction of the section, as it read prior to the amendment, which would enable an established business to be dislodged with attending loss to the owner, by a church, chargeable with knowledge of the existence of already established businesses in the neighborhood, voluntarily locating within the 100 feet area.

While it is true that the renewal of a license without qualification refers both to the person applying and to the premises, the language employed in the amendment which specifies and emphasizes the premises and makes no mention of the licensee or person, indicates that it was the

intention of the legislature that the 100 feet prohibition shall not apply to a lawfully established tavern or liquor store. The substitution of one person qualified to receive a license for another person bears no reasonable relation to the purpose of the amendment which was, as we view it, the protection of an established and going business from arbitrary interposition.

As we read the entire proviso contained in Section 8 as amended its meaning appears to be to accord reasonable protection to established businesses. Our opinion, therefore, is that it would not be improper to issue a city's retailers license for the premises in question to a duly qualified applicant who would be the immediate successor of the present licensee.

PROPOSED LIQUOR CONTROL ORDINANCE

(No. 11044—Chairman, License Committee—M. H. F.—March 31, 1948.)

A proposed ordinance relieving the Mayor of his power to summarily revoke any tavern license would establish a policy inconsistent with the state law and should not be adopted.

Citations:

Illinois Liquor Control Act: Art. V, Sec. 10.

Art. VI, Sec. 12a.

Art. VII, Sec. 9.

Ordinance: Municipal Code, Ch. 101, Par. 27.

Cases: 162 Ill. 534, 544.

183 Ill. 104.

234 Ill. 146.

362 Ill. 80.

367 Ill. 310.

118 Ill. App. 525.

50 N. J. L. 595.

50 Conn. 321.

61 Ia. 672.

100 Pac. 225 (N. Mex.).

Other references: McQuillan on Municipal Corporations 2d ed., Vol. 2, Sec. 519.

OPINION OF FOREGOING SYNOPSIS

With your communication of March 22, 1948 you forwarded a copy of a resolution introduced by the Alderman of the 33d Ward, concerning which you request our opinion. The resolution reads as follows:

WHEREAS, Under the existing ordinance of the City of Chicago, Chapter 101, Paragraph 27, the Mayor, acting as Commissioner, is empowered to revoke a license granted to the owner and operator of a tavern upon cause shown, solely within the discretion of the Mayor; and

WHEREAS, The right and power thus granted under the existing ordinance, empowers the Mayor, acting as Commissioner, without notice and without a hearing, trial or warning, to revoke a license, and such revocation in effect serves as a direction or mandate to the Commissioner of Police to immediately remove the license and to close down the place of business; and

WHEREAS, Such action, with or without cause, once having been directed by the Mayor, results in instant and irreparable damage to a merchant who may be innocent of the charges against him; or if guilty, may suffer losses and damages grossly out of proportion to the alleged offense; and

WHEREAS, Such harsh, arbitrary police power serves to create a continued threat against the safety and security of a law-abiding citizen having a substantial investment in a lawful business; and

WHEREAS, Such authority and power is in conflict with the spirit and letter of the Bill of Rights and the Constitution of the State of Illinois, inasmuch as it denies a citizen the right to a full, fair and impartial hearing, and the opportunity to defend *before* adjudication and *before* the severe penalty of confiscation is imposed.

NOW, THEREFORE, BE IT HEREBY RESOLVED, That the City Council of the City of Chicago recommend to the Mayor the creation of a committee of not less than three (3) fair and impartial persons, to whom complaints against tavern owners be referred *before* revocation, upon due notice in writing being given to the licensee, containing the charges or the complaint.

BE IT FURTHER RESOLVED, That such committee be empowered to investigate and hear all charges and defenses and thereafter be authorized and empowered to make its recommendations to the Mayor, in accordance with its findings.

BE IT FURTHER RESOLVED, That pending hearing and prior to a decision by the Mayor, the Licensee shall be presumed innocent of the charges, and such presumption shall remain until evidence to the contrary shall be submitted to and heard by the members of the committee, prior to adjudication and findings.

BE IT FURTHER RESOLVED, That such committee shall be empowered to establish rules providing for a fair and impartial trial or hearing for the protection of all parties and in accordance with established principles of justice."

The apparent purpose of the resolution is to take from the Mayor, as Local Liquor Control Commissioner, the power of summary revocation action, or neutralize such power by setting up a committee authorized to investigate and hear all charges and defenses and make recommendations to the Mayor in accordance with its findings. The plan would enable a law violating retail liquor dealer to continue in operation until after notice, hearing and findings of the committee.

The proposal to postpone revocation action until after notice and hearing is in substance one of those urged, unsuccessfully, by retail liquor dealer organizations upon the General Assembly at its 1947 session.

Before proceeding to discuss the resolution itself it seems fitting that we comment briefly upon some of the recitals contained in the *whereas* clauses, upon which the resolution is predicated.

The first of such clauses states that under the existing ordinances the Mayor is empowered to revoke a license "upon cause shown, solely within the discretion of the Mayor." This is a misleading statement. The city ordinance is superimposed upon the Illinois Liquor Control Law. It is an exercise of the power conferred by that law, and the Mayor as Local Liquor Control Commissioner is by the ordinance vested with only such authority as is conferred upon him by the paramount law. He is not free to revoke a license solely within his discretion, but is limited to revoking for cause. Cause means due or proper cause, such as a violation of one

or more provisions of the statute or applicable city ordinances. It is a mistake to assume that the Mayor is vested with uncontrolled or unregulated revocation power, or that he may act capriciously. Furthermore, the law presumes that public officials will act honestly, within the authority granted them and not otherwise. McQuillan on Municipal Corporations, 2d Ed. Vol. 2, Section 519, page 196.

The business of trafficking in intoxicating liquors has ever been a dangerous business, one necessarily subject to stringent regulation. The sale of such liquors is in a class by itself, since it is affected with a public interest. Restrictions upon the liquor business are valid which would be obnoxious to other pursuits. *Swift v. The People* (1896), 162 Ill. 534, 544. The right to engage in the liquor traffic is a mere privilege which the state may grant or withhold at will. Under the Illinois Law a liquor license is not property. Section 1, Article VI, Illinois Liquor Control Law. A license is not a contract and creates no vested rights. *The People v. McBride* (1908), 234 Ill. 146. One who procures a license and engages in such business assumes the risks incident to the business and voluntarily subjects himself to such reasonable regulations, drastic though they may be, as the state may impose under its power to prohibit entirely or permit under such limitations and control as it sees fit to prescribe. Because of the hazardous nature of the liquor business the law relating to such business is said to be *sui generis*. *State v. Judges*, 50 N. J. L. 595.

In another whereas clause, and with reference to the power of summary revocation action, it is said that "such action, with or without cause, once having been directed by the Mayor, results in instant and irreparable damage to a merchant who may be innocent of the charges against him; or if guilty, may suffer losses and damages grossly out of proportion to the alleged offense." This is hardly a fair statement because the Mayor, as Local Liquor Control Commissioner, does not revoke "without cause." Again, it is not for the proponents of the resolution to say that revocation "is grossly out of proportion to the offense." The legislature, the representative of all the people of the state, has said that the Local Commissioner may revoke any license issued by him if he determines that the licensee has violated any of the provisions of the state law or any valid ordinance enacted by the city council which is not inconsistent with the law. Section 5, Article VII, State Law. Other provisions of the act make it mandatory to revoke licenses for certain violations of the law. Section 12a, Article VI and Section 9, Article VII, and Section 5, Article X, State Law.

Still another whereas clause states that the authority and power reposed in the Local Commissioner by the State Act to summarily revoke "is in conflict with the spirit and letter of the Bill of Rights and the Constitution of the State of Illinois." Sufficient answer to this statement is that the Supreme Court of Illinois has already passed upon and upheld the Liquor Control Act.

City of Fairfield v. Pappas (1935), 362 Ill. 80;

Great Atlantic & Pacific Tea Co. v. Danville (1937), 367 Ill. 310.

The law is well settled that summary action by local liquor control authorities is constitutional and valid.

48 Corpus Juris Secundum, page 290.

Woollen and Thornton, Law of Intoxicating Liquors, Vol. 1, Section 450, page 741.

City of Chicago v. Netcher, 183 Ill. 104.

Anderson v. City of Galesburg, 118 Ill. App. 525.

Lagrox v. Fairfield Co., 50 Conn. 321.

Columbus City v. Cutcomp, 61 Iowa 672.

Floock v. Bureau of Revenue, 100 P. 2d 225, 44 N. M. 194.

The same clause also speaks of the "severe penalty of confiscation." There can be no confiscation when a liquor license does not constitute property.

Now with reference to the resolution itself. To require a formal committee hearing and the making of formal findings would doubtless entail delays incident to procuring formal service of notice upon the licensee, assembling of the members of the committee, postponements made necessary in securing the attendance of witnesses and to accommodate counsel, and in preparing formal findings and forwarding them to the Mayor. It is conceivable "that such delays might be protracted." In the meantime a law violating licensee would be at liberty to keep his tavern open and continue his violations regardless of how flagrant they might be.

We find nothing in the Liquor Control law which authorizes the Mayor to transfer or delegate or relieve himself of the powers and duties given to and placed upon him. The legislature designated the Mayor as local liquor control commissioner because the Mayor is the chief executive of the city, elected by its legal voters, bonded and sworn to administer the affairs of the municipality and enforce the established law. Certainly it was not the intent of the legislature that the important duties placed upon the Mayor in connection with the matter of determining whether retail licensees have violated provisions of the statute or city ordinances should be avoided and transferred to a group of individuals who are not made responsible under the law. Whatever might be the integrity and qualifications of the members composing the group it could hardly be expected that the determination of questions whether the law had been violated would be left to a committee. This does not mean that the Mayor as local commissioner could not have others assist him in investigating charges or complaints, finding facts, and in an advisory capacity recommending action; but only that he could not delegate to others his statutory duty of making determinations as to law and ordinance violations.

It is believed the answer to the thesis of the resolution is that the Mayor does not act arbitrarily in revoking licenses, but only upon recommendation of the commissioner of police after investigation and report from the police department. The statute makes provision for the conduct of hearings upon complaints and presumably the Mayor now conducts such hearings as are necessary in any particular case. It is the policy of the Liquor Control Act that a full hearing of the charges and the defense shall be had upon appeal to the License Appeal Commission where a trial de novo is expeditiously had. Until the public policy established by law is changed, the city council may not adopt a policy inconsistent with the state law.

Looking at the matter from a different angle of approach it is believed that preventing the Mayor from taking immediate or summary action to revoke a violator's license and close an offending tavern would bring about in a large city like Chicago a breakdown in adequate liquor control. The statutory right now given the Mayor to take summary action, without being incumbered or hampered by an auxiliary hearing committee and without being thwarted by protracted delays in meeting necessitous situations, is indispensable to proper and adequate liquor regulation and control. It takes no great amount of experience or imagination to visualize those instances in which prompt action is necessary adequately to cope with flagrant violations. To tie the hands of responsible municipal officials and to prevent them from promptly suppressing infractions of the law and abating public nuisances, and to permit law violators to continue their violations until after protracted delays incident to committee hearings would not only be unfortunate for the law abiding citizens but also a setback to legitimate law abiding liquor dealers.

No serious harm or irreparable damage can come to licensees who feel that they have not violated the law, as the State Liquor Control Law

now provides for a prompt review of the Mayor's action by the License Appeal Commission, and this without cost or expense to a licensee who may feel himself aggrieved by the Mayor's action.

Our conclusion, therefore, is that the proposal contained in the resolution would establish a policy inconsistent with the state law and for this reason our opinion is that the resolution should not be adopted.

B. DRIVERS' AND VEHICLE LICENSE

VEHICLE LICENSE FOR NON-RESIDENTS

(No. 10762—Commissioner of Police—J. H. S.—January 7, 1944.)

Only resident owners of vehicles are required to obtain City vehicle emblems. In the case of corporations, the place of residence would be the home office and principal place of business.

Citations: 240 U.S. 642.
82 Ill. 693.
164 Ill. 420.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of a letter dated December 27, 1943 on behalf of certain motor carriers who are engaged in interstate commerce. Stating that arrest slips are being issued to motor carriers engaged in interstate commerce who are not domiciled in Chicago, but come to the City of Chicago to make pickups or delivery in interstate and return to their place of domicile.

On September 24, 1934 we wrote concerning a similar complaint received by us from Central Motor Freight Association, Inc. We advised in our letter of September 24, 1943 that the City of Chicago may not impose a vehicle tax or license fee for the privilege of using the streets upon owners of vehicles who are *not resident within the city* regardless of their character of operation. May we again suggest that police officers be advised that only resident owners of vehicles are required to take out city vehicle tags. In the case of a corporation, the place of residence would be the home office and principal place of business. (*Fairbanks Shovel Company v. Wills*, 240 U.S. 642 (1915); *Bank of North America v. Chicago etc. R. R. Co.*, (1876) 82 Ill. 693; and *Hewitt v. General Electric Company* (1897) 164 Ill. 420). Where all indications point to nonresidence of the owner of the truck in question, for example, foreign state license, city vehicle tag other than a Chicago tag, address of the owner painted on the truck, and office of the company as disclosed on state registration card, the time of every one will be conserved and vital transportation will be unimpeded if the police officers will refrain from issuing tickets for failure to have a Chicago vehicle tag.

**VEHICLES OPERATED BY DEFENSE PLANT CORPORATION
SUBJECT TO VEHICLE TAX**

(No. 10765—City Clerk—M. H. F.—January 25, 1944.)

Vehicles registered with the State as being owned by the Dodge Chicago Plant, but operated by the Defense Plant Corporation are subject to the City's vehicle tax ordinance.

Ordinance: Mun. Code, 29-2.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date forwards (1) a letter dated January 11, 1944 from the Dodge Chicago Plant, Division of Chrysler Corporation, and (2) a copy of a letter dated January 4, 1944 from the contracting officer in the office of the Army Air Forces Resident Representative at the Dodge Chicago Plant.

Both enclosures relate to the application of the city's wheel tax ordinance to motor vehicles operated in Chicago by the Dodge Chicago Plant. It is stated that the Chrysler Corporation, through its division, Dodge Chicago Plant is performing under a contract with the Army Air Forces on a cost-plus-fixed-fee basis, and in connection therewith operates a considerable number of Defense Plant Corporation owned motor vehicles; that all these motor vehicles have painted thereon, in a conspicuous place, the following words: "Property of the Defense Plant Corporation, an instrumentality of the United States Government"; and that the contracting officer will not pass the vehicle license fees as allowable items of cost under the cost-plus contract. It is contended that when the vehicles are marked as above indicated they may not be taxed by the city.

You ask our advice concerning the matter.

Section 29-2 of the city's wheel tax license ordinance provides in part as follows:

"It shall be unlawful for any person residing within the city to use, or to cause or permit any of his agents or employees to use, any motor vehicle upon the public ways of the city, unless such vehicle be licensed as hereinafter provided."

The Dodge Chicago Plant is obviously a resident of the City of Chicago within the purview of the above quoted provision.

You have informed us that the vehicles in question are registered from a Chicago address with the Secretary of State of Illinois under the Illinois Motor Vehicle Act, and that the Dodge Chicago Plant pays the State registration fee thereon. To register a motor vehicle under the State Act the owner of the vehicle is required to file an application for a Certificate of Registration, properly sworn to, setting forth his name and address with a description of the vehicle. When the Dodge Chicago Plant files applications for certificates, which applications state under oath that it is the owner of the vehicles and its residence is Chicago, it is presumptive evidence of ownership and residence and that these vehicles are subject to the city's ordinance. For the purpose of this opinion we need not pursue the subject further.

Our opinion, therefore, is that the vehicles referred to in your communication are subject to the city's wheel tax license ordinance.

NO VEHICLE TAX ON GOVERNMENT CARS

(No. 10772—City Clerk—M. H. F.—April 8, 1944.)

Cars owned and operated by the Defense Plant Corporation are exempt from the city's wheel tax license ordinance.

Citations:

- Statutes: U. S. Code, Title 15, secs. 601, 603, 610.
IRS '43, Cities and Villages Act, Ch. 95½, secs. 23-53, 26a.
Ordinances: Mun. Code, ch. 29.
Cases: 235 Ill. 58.
239 Ill. 237.

OPINION OF FOREGOING SYNOPSIS

Your communication of March 1, 1944 transmits a letter from a steel company, as agent for Defense Plant Corporation, 38 S. Dearborn Street, Chicago, which inquires whether it is necessary to procure a city vehicle license for an automobile registered with the Secretary of State in the name of Defense Plant Corporation, which vehicle is said to be used by the Division Engineer of Defense Plant Corporation whose office is at 38 S. Dearborn Street, Chicago, and which vehicle is lettered on its side "Property of Defense Plant Corporation, an instrumentality of the United States Government."

Delay in replying to your inquiry has been occasioned by the statement made in the steel company's letter to the effect that the vehicle is registered with the Secretary of State of Illinois under the Illinois Motor Vehicle Act. If the owner of the vehicle is exempt from taxation under State and local laws, it seemed to us to be inconsistent for the Defense Plant Corporation to claim exemption from the provisions of the city's ordinance and not claim like exemption under the State Act. We have requested an explanation from the Chicago office of Defense Plant Corporation but it has not yet been received, so rather than subject you to further delay we are completing our opinion without the information.

Subject to certain exceptions, the city's wheel tax license ordinance, Chapter 29 of the Municipal Code of Chicago, imposes a tax in the form of a license fee upon the resident owner of every motor vehicle operated on the public ways of the city. All vehicles owned or operated by the United States Government are exempt from the provisions of the chapter requiring the payment of the tax.

By section 23-53 of the Revised Cities and Villages Act, Illinois Revised Statutes, 1943, the city has been granted express power "to license, tax, and regulate all vehicles conveying loads within the municipality." Section 26a of the Illinois Motor Vehicle Act, Chapter 95½, Illinois Revised Statutes, 1943, with certain limitations, authorizes cities to require the owners of motor vehicles to pay a license fee as a condition precedent to using the vehicles on the streets. The Supreme Court of Illinois has construed Chicago's Wheel Tax ordinance as a valid revenue measure, passed under the taxing power of the city, and as one requiring the owners of motor vehicles to pay the license fee or tax. *Ayres v. City of Chicago*, (1909) 239 Ill. 237; *Harder's Storage Co. v. City of Chicago*, (1908) 235 Ill. 58.

The tax imposed by the ordinance must therefore be viewed as a tax upon the owner of the vehicle.

We have already advised you in an opinion rendered November 5, 1943 that motor vehicles owned by resident contractors or subcontractors engaged by the Defense Plant Corporation to construct defense plants or operating plants producing war material and equipment, were subject to the terms of the Wheel Tax ordinance.

In the instant case, however, it is claimed that the vehicle in question is the property of Defense Plant Corporation and is used exclusively by a Division Engineer of that corporation on Government business.

The Defense Plant Corporation was organized and is financed by the Reconstruction Finance Corporation pursuant to Section 608b of Title 15, U. S. Code, to produce, acquire and deal in implements of war and materials necessary to the national defense and to acquire land and to construct or acquire buildings by purchase, lease or otherwise for the manufacture of such implements and materials.

The Reconstruction Finance Corporation was created by sections 601 and 603 of Title 15, U. S. Code, with capital wholly subscribed by the United States Government. Section 610, relating to the obligations of the Reconstruction Finance Corporation and its subsidiaries, provides in part as follows:

"* * * The corporation, including its franchise, its capital, reserves and surplus and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, * * *. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned by, the Reconstruction Finance Corporation or by any corporation referred to in Clause (1), * * * of the preceding sentence, * * *."

The above quoted provision of the U. S. Code should, we believe, settle the question whether the property of Defense Plant Corporation is exempt from taxation by the City of Chicago. The corporation and its personal property appears to be exempt; its real property is not exempt.

If, therefore, the vehicle in question is the property of Defense Plant Corporation, our opinion is that it is exempt from taxation under the city's Wheel Tax ordinance.

WHEEL TAX ORDINANCE

(No. 10829—Commissioner of Police—M. H. F.—December 29, 1944.)

Auto truck carriers whose principal office is located in Chicago are subject to the provisions of the City's wheel tax ordinance even though engaged in interstate commerce.

Citations:

Ordinance: Municipal Code, ch. 29.

Other references: 18 Op. Corp. Coun. 472.

19 Op. Corp. Coun. 137.

20 Op. Corp. Coun. 145.

21 Op. Corp. Coun. 150.

OPINION OF FOREGOING SYNOPSIS

Your letter of December 26, 1944, transmits a copy of a communication from the commanding officer, Motorcycle Division, and a copy of a statement made on behalf of an auto carrier. From the statement it appears that the auto carrier is a resident of Chicago, having its principal place of business in the city, and that it operates motor trucks from this address, which trucks are registered under the Illinois Motor Vehicle Act and bear Illinois license plates. It is also said that they bear ICC plates or markings and the representation is made that they are used in interstate commerce. The attorney objects because his company has received arrest notifications of violations of the city's wheel tax ordinance and he contends that because the company's vehicles are used in interstate commerce they are exempt from the city's ordinance. You request our opinion upon the question.

We have repeatedly advised you that the city may impose a vehicle tax under its wheel tax license ordinance, Chapter 29 of the Municipal Code of Chicago, for the privilege of using its streets, upon vehicle owners who are residents of the city, regardless of whether the vehicles are used in interstate commerce. Please refer to opinions of the Corporation Counsel, Volume XVIII, p. 472; Volume XIX, p. 137; Volume XX, p. 145, and Volume XXI, p. 150.

Based upon the facts disclosed in the instant matter our opinion is that the auto carrier which has its principal place of business in Chicago, is a resident of Chicago and therefore required to procure licenses and pay the wheel tax imposed by Chapter 29 upon its trucks operated on the public ways of the city.

A copy of this opinion is being forwarded to the assistant corporation counsel in charge of the Division of Ordinance Enforcement to the end that any further attempts to secure dismissal of Municipal Court prosecutions instituted against this auto carrier, or those similarly situated, may be resisted.

INTER-STATE TRUCKS

(No. 10955—J. F. G.—April 3, 1947.)

If a trucking corporation is a resident of the City of Chicago the City may exact from such corporation a motor vehicle license with respect to each motor vehicle owned and operated on the streets of Chicago, notwithstanding that such vehicles are used in interstate commerce.

Citation: Municipal Code, 29-2.

OPINION OF FOREGOING SYNOPSIS

Replying to your inquiry of March 20, 1947 concerning necessity for your trucks engaged in interstate operation to secure vehicle tax sticker, please be advised that this office on two separate occasions, August 19, 1936 and July 24, 1942 issued formal opinions to the effect that vehicles of the type described by you are subject to the city vehicle tax.

We note that your company is a resident of the city of Chicago. In this connection we quote from the opinion issued by this office on August 19, 1936.

"The City of Chicago may impose a vehicle tax or license fee for the privilege of using the streets by owners of vehicles who are resident within the city irrespective of whether the vehicles are used in a business that is transcontinental, interstate, intercity, or intracity or whether such business is that of a contract carrier or common carrier."

We quote from the formal opinion of July 24, 1942:

"Accordingly if your corporation is a resident of the city of Chicago the City may exact from you a motor vehicle license with respect to each motor vehicle owned by you and operated upon the streets of the city." (Sec. 29-2—Municipal Code of Chicago).

Your home office and principal place of business is at Chicago. Under these circumstances the residence of your company is considered to be Chicago.

It is accordingly our opinion that the city policeman who stopped one of your interstate vehicles on Western avenue and instructed him that his tractor should have a City of Chicago vehicle sticker, regardless of the fact that the vehicle was used only in interstate commerce was clearly within his rights and that you are obligated to obtain a vehicle tax sticker under the circumstances set forth in your letter.

VEHICLE TAGS—NON-RESIDENTS

(No. 11059—Commissioner of Police—W. M. B.—June 2, 1948.)

City of Chicago vehicle tags are not required on trucks owned and operated by non-residents.

Citations:

Ordinance: Municipal Code, 29-7.

Other reference: 19 Op. Corp. Coun. 137.

OPINION OF FOREGOING SYNOPSIS

In accordance with an opinion handed down by L. Louis Karton, Head of Appeals and Review Division, I found it necessary to nonsuit 350 cases for violation of Chapter 29—Section 7 of the Municipal Code of Chicago which were set for trial in Branch 43, Room 800, 1121 South State Street, yesterday June 1, 1948. All of these cases arose as a result of the issuance

of tickets by the police of the city of Chicago for failure to have current vehicle stickers on trucks engaged in interstate commerce exclusively, which trucks were owned by companies whose principal place of business was outside of the city of Chicago.

In accordance with a 1936 opinion by the Corporation Counsel, Vol. XIX, p. 137, it was pointed out that the City has no power to impose a vehicle tax or license fee for the privilege of using the streets of the city of Chicago upon owners of vehicles who are not residents of the City regardless of the character of their operation.

May I respectfully refer to a communication to the Commissioner of Police dated September 24, 1943, covering the same subject matter wherein it was pointed out:

"Where all indications point to non-residence of the owner of the truck in question, for example, foreign state license, city vehicle tag other than a Chicago tag, address of the owner painted on the truck, and office of the company as disclosed on state registration card, the time of every one will be conserved if the police officers will refrain from issuing tickets for failure to have a Chicago vehicle tag."

In accordance with the foregoing opinions, may I respectfully ask you to issue an order instructing all policemen to refrain from issuing tickets for failure to have current vehicle tags under the above mentioned circumstances.

C. OTHER LICENSES AND PERMITS

CIGARETTE LICENSE FOR PRIVATE CLUB

(No. 10732—Chicago Bar Association—M. H. F.—January 12, 1943.)

The Chicago Bar Association is subject to the City's power to regulate and inspect the sale of tobacco and must obtain a cigarette license.

Citations:

Statutes: IRS '41, ch. 24, art. V, sec. 1, pars. 50, 66, 78. Ch. 120, par. 440.

Cases: 177 U.S. 183.
89 Fed. 2d, 610.
381 Ill. 194.

OPINION OF FOREGOING SYNOPSIS

We have your request that we examine the decision rendered by the Supreme Court of Illinois November 18, 1942, in the case of *Svithiod Singing Club, et al., v. McKibbin*, 381 Ill. 194, and inform you whether our opinion is that this decision disturbs the authority of the City to require the Chicago Bar Association to procure a city license for the sale of cigarettes to members and guests within the quarters occupied by the association.

The court's decision referred to is one interpreting the Illinois Retailers' Occupation Tax Act (Ill. Rev. Stat. 1941, Chap. 120, par. 440 *et seq.*). It holds that the exaction imposed by the act is an occupation tax upon the class of vendors described in the act, i. e., upon persons engaged in the business of selling tangible personal property at retail. It further holds that the Svithiod Singing Club, and the other private social clubs which were parties plaintiff to the suit, were not engaged in the "business" of selling tangible personal property at retail, within the act. The court expressed the view that the word "business" means any particular occupation or employment, habitually engaged in, especially for livelihood or gain; that isolated or occasional sales of tangible personal property at retail by persons who do not hold themselves out as engaged in the business of selling such tangible personal property at retail, does not constitute engaging in such business; and therefore, that the plaintiff clubs, which were nonprofit corporations, whose primary objects were the promotion of social intercourse among their members and the advancement of cultural arts and sciences, and whose charters do not permit them to enter into and transact business for profit, were not subjected to the tax by furnishing food and drinks to their members as an incident to and for the purpose of furthering their primary objects, though not to the general public.

For the purpose of this opinion we assume that the Chicago Bar Association is a nonprofit corporation, generally similar in character to the clubs which were parties plaintiff in the *Svithiod* case.

The statute involved in the *Svithiod* case was essentially a taxing act, designed wholly for the purpose of procuring revenue to defray the expenses of the State government. The City's cigarette ordinance is different in character from the State act in that it is a regulatory measure, enacted not under the power to tax, but under the municipality's health and police powers, and having for its purpose the preservation of health. The licensing of those who handle cigarettes is but one of the legitimate means of regulation, and the license fee prescribed is exacted for the purpose of defraying the expense of regulation.

The historical background of the ordinance clearly shows that this is so. In the year 1898 the City's cigarette license ordinance was examined by the Supreme Court of Illinois and upheld under the City's health power, its general police power, and also its power to provide for and regulate the inspection of tobacco, (Pars. 50, 66, 78, sec. 1, art V, Chap. 24; Sec. 23-105, 23-81, and 23-64, Rev. Cities and Villages Act.) The court in its opinion set forth paragraphs 50, 66 and 78 and beginning on page 347 said:

"By the paragraphs above quoted power is expressly given the city to provide for and regulate the inspection of various enumerated articles, including tobacco, and this would include the various forms in which that product is prepared and used. The purpose of conferring this power of providing for and regulating the inspection of those various enumerated articles is to subserve the public welfare and protect the public health and is required in that interest. * * *

"Paragraph 66 before quoted expressly authorizes the adoption of ordinances necessary to police power, and paragraph 78 is an express authorization of the city council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community,

and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporations. * * *

"When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. * * * It being clear that the public health and welfare of a large class in the community would be subserved and protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78."

The *Gundling* case was reviewed and affirmed by the Supreme Court of the United States and is reported as *Gundling v. Chicago*, 177 U. S. 183.

In 1937 the city's cigarette ordinance was again considered and the validity of an added section, prohibiting the use of coin-operated cigarette vending machines, upheld by the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Illinois Cigarette Service Company v. City of Chicago*, 89 F. (2d) 610.

That the ordinance is contained within the chapter of the Municipal Code of Chicago entitled "tobacco dealers", and that the ordinance makes it unlawful to engage in the business of retail tobacco (cigarette) dealer without a license, is not thought to be of material consequence in connection with the fundamental question concerning the power of the city to regulate the sale of cigarettes in and by Chicago clubs, or other nonprofit organizations. If clubs selling cigarettes should oppose compliance with the ordinance in its present form, or there should be danger of the courts holding that clubs and other similar organizations could sell cigarettes without a license because they were not engaged in the business of cigarette or retail tobacco dealer, it would be a simple matter for the city council to change the wording of the ordinance.

Our conclusion, therefore, is that the *Svithiod* decision is distinguishable and does not affect the power of the City of Chicago to prohibit any one from selling cigarettes at retail without first procuring a city license so to do.

VEHICLES OPERATED BY FEDERAL AGENCIES

(No. 10745—M. H. F.—April 27, 1943.)

Vehicles owned by the Ford Motor Company and operated by the Federal Government on a cost plus fixed fee contract are subject to Wheel Taxes under the Municipal Code.

Citations: 318 U.S. 261.

OPINION OF FOREGOING SYNOPSIS

The department is in receipt of your letter of April 21, 1943 and appreciates the cooperative manner in which you present your inquiry regarding city wheel tax exactions as applied to motor vehicles owned by your company but operated exclusively for the benefit of the Federal Government in conjunction with an ordinance cost-plus-fixed-fee contract.

Specifically you refer to three passenger cars, 35 horsepower or less, and two trucks, one of one ton capacity and the other of over one ton capacity, for all of which city vehicle licenses have already been purchased.

You state that title to these vehicles is in the Ford Motor Company; that the vehicles have been registered by your company with the State of Illinois and carry the customary State plates; that the units are operated by both employees of your company and army ordinance personnel; that they are operated on the public streets of the city, though their operation is restricted to 100% government use as developed by contract requirements.

The question presented is whether the vehicles are exempt from taxation under the city's wheel tax ordinance, by reason of the fact that they are operated exclusively in the performance of your contract with the government.

Recently we have had occasion to consider the status of property used and operated by agencies or instrumentalities of the Federal Government with the view of determining whether government contractors are immune from local regulatory laws and ordinances. The conclusion reached by us was that no such immunity exists.

Our determination is fortified by the decision of the Supreme Court of the United States in the case of *Penn Dairies Inc. v. Milk Control Commission of Pennsylvania* (1943), 318 U.S. 261, 63 Sup. Ct. Rep. 617, wherein the court held that persons contracting to furnish supplies or render services to the Federal Government do not perform governmental functions within the rule that federal officers and agencies performing governmental functions are immune from state regulation. The fact that nondiscriminatory taxation or regulation of a contractor by a state imposes an additional economic burden on the Federal Government was thought not to bring the contractor within any implied immunity from state taxation or regulation. This decision seems to dispel any doubt concerning the character of local laws and regulations which may be held not to be an interference with the functions of the Federal Government.

Our opinion therefore is that, notwithstanding the fact that these vehicles are used exclusively in the performance of your contract with the Federal Government, they are subject to license under the city's ordinance.

REFUND OF BUILDING PERMIT FEE

(No. 10747—Chairman, Finance Committee—M. H. F.—May 26, 1943.)

The City can enforce building ordinances in construction of plants for the Defense Plant Corporation. Fees paid for such buildings were properly levied and should not be refunded.

Citations:

Cases: 247 U.S. 251, 275.
302 U.S. 134, 148.
318 U.S. 261.

Council orders: Coun. J. p. 8456, (Mar. 18, 1943).

OPINION OF FOREGOING SYNOPSIS

Your communication of May 3, 1943 transmits your committee's file in the above matter and you request our opinion concerning the city's obligation to allow the claim.

The claim is one filed by an agent of Republic Steel Corporation, for the refund of sums aggregating \$3,068.50 paid during the year 1942 for building department permits granting permission to erect buildings at a defense plant located at 114th street and Burley avenue, within the city limits, which permits are required by the provisions of the Municipal Code of Chicago. Claimant seeks the return of the monies on the ground that in erecting the buildings it functioned as the agent of the Republic Steel Corporation, acting for and on behalf of Defense Plant Corporation, and that Defense Plant Corporation is immune from such payments.

The file shows that your committee, believing an opinion of this department given the Commissioner of Buildings was controlling upon the matter, recommended the allowance of the claim and that the city council by an order passed March 18, 1943 (Council Journal, page 8456) authorized the making of the refund. This order, however, was reconsidered at the council meeting held April 9, 1943 (Council Journal, page 38), and the matter rereferred to your committee.

The opinion alluded to is that rendered August 20, 1942. Since its rendition we have had occasion to re-examine our State law ceding exclusive jurisdiction to the United States in and over land acquired by it in accordance with the 17th clause, 8th section of the first article of the Constitution of the United States in the light of the history of such legislation and the decisions of courts of last resort, and also to review the question now presented in the light of recent decisions of the Supreme Court of the United States.

In an opinion given you March 1, 1943, the conclusion was reached that former opinions of this department relating to the immunities of the United States and its instrumentalities based upon the Illinois Cession Act of 1923 must be withdrawn, and that the view must obtain that ownership by the Defense Plant Corporation does not remove property from the jurisdiction of State and local laws which do not defeat or impair the execution of the powers of the Federal government. Since that opinion was written and in fact on the date that it bears, March 1, 1943, the Supreme Court of the United States handed down two opinions which not only support the conclusions to which this department arrived and the reasons assigned therefor but also dispel any doubt which we might have had concerning the character of local laws and regulations which may be held not to be an interference with the functions of the Federal government. The cases referred to are (*Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U. S. 261, 62 Sup. Ct. 617; and *Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 87 L. ed. 560, 63 Sup. Ct. 628.)

In the first case cited the court held that minimum price regulations imposed under the Pennsylvania milk control law applied to the sale of milk to the United States army at a military encampment located on land belonging to the Commonwealth of Pennsylvania and leased to the Federal government.

In the second case the court held that minimum price regulations imposed under the California milk control law were inapplicable to the sale of milk at a military encampment located on land acquired by the United States with the consent of the State of California in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States.

With the elimination of defense plants from the category of Federal enclaves, the Pennsylvania case is controlling upon the question whether the city's licensing and inspection ordinances are applicable to persons having contracts with Federal agencies or corporations for the construction of defense plants and the production of implements of war. The court held that persons contracting to furnish supplies or render services to the Federal government are not "agencies of the United States" and do not perform governmental functions within the rule that Federal officers and agencies performing governmental functions are immune from State regulation. The fact that nondiscriminatory taxation or regulation of a contractor by a State imposes an additional economic burden on the Federal government was thought not to bring the contractor within any implied immunity of the Federal government from State taxation or regulation. In its opinion the court said:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and regulate their internal affairs and policies, and that state regulation like state taxation inevitably imposes the same burden on the national government of the same kind of those imposed on the citizens of the United States within the state's borders. * * * And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system.

* * *

"Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require."

The court then went on and stated that it was not advised of any congressional legislation or any discernible congressional policy with which the State's regulation of the contractor would conflict, and reached the ultimate conclusion that the Constitution and Laws of the United States did not preclude the application of the State's Milk control law to the contractor.

INFORMATION REQUIRED ON PAWNBROKER'S RECEIPT

(No. 10767—Better Business Bureau—M. H. F.—February 3, 1944.)

A pawnbroker must state on the receipt-ticket the exact rate of interest charged, expressed in percentage figures.

Citations:**Statutes:** IRS '43, ch. 107½, secs. 2, 3, 5, 6 and 7.**Ordinances:** Mun. Code, 159-10.**OPINION OF FOREGOING SYNOPSIS**

The department is in receipt of your letter of January 27, 1944 in which you ask us to interpret the Municipal Code of Chicago and advise you whether pawnbrokers are required to state the exact rate of interest charged on the receipt or pawn contract given to the customer, and also whether the mere description on the receipt, such as "man's watch" is "an accurate account and description" of the thing pawned and is "the substance of the entry" required to be made in the pawnbroker's record book.

The State Act for the regulation of pawnbrokers, Chapter 107½, Illinois Revised Statutes, 1943, makes it unlawful for any pawnbroker to charge or collect a greater benefit or percentage upon money advanced, and for the use and forbearance thereof, than the rate of three per cent per month. (Section 2.)

Every pawnbroker is required by section 3 of the act to have and keep section 2 of the act printed in the English language and framed and posted in a prominent and conspicuous position in his place of business, so that the same shall be plainly legible and visible to all persons depositing or pledging property with such pawnbroker.

Section 4 provides as follows:

"Every pawnbroker shall, at the time of making any advancement or loan, deliver to the person pawning or pledging any property a memorandum or note signed by him containing an accurate account and description, in the English language, of all the goods, articles or other things pawned or pledged, the amount of money, value of thing loaned thereon, the time of pledging the same, the rate of interest to be paid on such loan and the name and residence of the person making such pawn or pledge."

The act further provides that every pawn and loan broker shall keep a book in which shall be written an accurate account and description of all goods, articles and other things pawned or pledged, the amount of money, value or thing loaned thereon, the time of pledging the same, the rate of interest to be paid on such loan, and the name of such person making such pawn or pledge; that said book, as well as every article pawned or pledged, shall at all times be open to the inspection of the members of the police force of the city in the county in which the pawnbroker does business; and further, that every pawnbroker shall make out and deliver to the superintendent of police or chief police officer of such city a daily report of all personal property received on deposit, and a description of the person by whom left in pledge.

The city's pawnbroker's license ordinance, chapter 159 of the Municipal Code of Chicago, enacts the substance of sections 2, 3, 5, 6, and 7 of the State Act. The memorandum to pledger section, which is section 159-10, provides as follows:

"Every such licensee shall at the time of each loan deliver to the person pawning or pledging any goods, article, or thing, a memorandum or note signed by him containing the substance of the entry made in his book as required by this chapter; and no charge shall be made or received by any pawnbroker or loanbroker or keeper of a loan office for any such entry, memorandum, or note."

It will be noted that section 159-10 of the ordinance is not the full equivalent of section 4 of the statute. It may be that certain city pawnbrokers are taking advantage of the words "the substance of" contained in the section and are not stating on the pawn ticket the rate of interest charged expressed in percentage figures, or are stating merely the words "interest, legal rate."

As we interpret the statute, section 4 thereof requires that the pawn ticket or memorandum given to the pledger, shall state the rate of interest to be paid in terms of rate of percentage, and that it will not suffice to state a mere conclusion such as "legal rate". In our opinion a pawnbroker would violate the State statute if he failed to state the exact rate of interest charged, expressed in percentage figures. Prosecutions may be instituted for violations of the State statute as well as violations of the city ordinance.

However, as we view the matter, the section of the code relative to the pawn ticket should not be less specific than the corresponding section of the statute. In order to remedy the matter we have prepared a form of ordinance amending section 159-10 of the code, a copy of which amendatory ordinance is enclosed herewith. After you have examined the same and indicated your concurrence, we shall be glad to forward the amendment to the committee on License of the City Council with our recommendation that the amendment be passed.

If the amendatory ordinance is passed it should, we believe, result in requiring the pawnbroker to adequately describe the article pawned on the pawn ticket, and thus remedy the matter suggested in your second point.

DRIVEWAY PERMITS

(No. 10768—J. F. G.—February 11, 1944.)

Permits for the construction and maintenance of driveways are personal privileges and do not run with the land. The successor in ownership of property upon which a driveway exists is not permitted to maintain the driveway, unless he secures a new permit.

Citation: Mun. Code: 33-15, 33-16, 33-21.

OPINION OF FOREGOING SYNOPSIS

Permits for the construction and maintenance of driveways are personal privileges and do not run with the land. The successor in ownership or possession of abutting property, under the existing ordinance, is not permitted to maintain the driveway without securing a new permit and the surety may relieve itself of liability only by performance of the obligation to restore the sidewalk to its original condition without cost or expense to the City, assuming of course that no claim for damages has arisen during the maintenance of the driveway.

USE OF POSTERS AND SIGNS

(No. 10775—Alderman, 38th Ward—A. F. G.—April 17, 1944.)

Under the Zoning Ordinance posters are not permitted in family residence, duplex residence, group house, apartment, and specialty shop districts. In business districts and the three other less restricted districts posters are a permitted use, however, frontal consents must be obtained. A poster on a wall board attached directly to the surface of the building wall is not within the exception set out in section 58-66 of the code.

Citation: Mun. Code. 58-66, 59-19, 193-20.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of April 14, 1944, in which you ask the following two questions:

"Will you kindly render an opinion as to whether or not a poster comes under the provisions of the Municipal Code of Chicago as to the requirement for frontage consents?"

Also, does posting on a smooth wallboard without frame attached directly to the surface of the wall of a building come within the exception set forth in 58-66 of the Municipal Code of Chicago?"

You do not say so but we assume the "poster" in question exceeds twelve square feet in area. Section 193-20 of the Municipal Code of Chicago reads as follows:

"No person shall post, stick, stamp, tack, paint or otherwise fix, or cause the same to be done by another person, any notice, placard, bill, handbill, sign, poster, card advertisement, or other device calculated to attract the attention of the public, upon any building or part thereof, wall or part thereof, or window, without first obtaining the written consent of the owner, agent, lessee, or occupant of such premises or structure; provided, however, that no person shall paste, post, or fasten any handbill, poster, advertisement, or notice of any kind, or cause the same to be done, which exceeds twelve square feet in area without first obtaining a permit so to do from the commissioner of buildings in accordance with the provisions of this code relating to billboards and signboards; and provided, further, that this section shall not apply to advertising matter upon billboards owned or controlled by private industries."

A poster is not a billboard or signboard as these terms are defined in the code unless it is attached to a structure which is affixed to the ground or to a building. By the terms of the section quoted above, an applicant for a permit to paste a poster must comply with all of the provisions of the code relating to billboards and signboards. One of the provisions of the code relating to billboards is found in section 59-19 and is as follows:

"59-19. Billboards). No person shall erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing

of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected or constructed. Such written consents shall be filed with the commissioner of buildings before a permit shall be issued for the erection or construction of such billboard or signboard."

Before a permit for a billboard may be issued as provided in this section frontage consents must be filed with the commissioner of buildings and as section 193-20 requires that before a permit for a poster may be issued the applicant must also comply with this frontage consent provision which is one of "the provisions of this code relating to billboards and signboards," we are of the opinion that frontage consents are necessary for "posters" before a permit can be issued.

In reply to your second question, we are of the opinion that a posting on a wall board attached directly to the surface of the wall of a building is not within the exception set out in section 58-66, but is within the definition of "billboard" as defined in that section. The section is as follows:

"Billboard. A billboard is hereby defined as a structure with a vertical or nearly vertical surface, erected for the outdoor display of posters.

"Signboards. A signboard is hereby defined as a structure with a vertical or nearly vertical surface, erected for the display of notices of any kind, other than posters.

"Exceptions. The faces of the walls of the flat surface of the roof of a building or other structure, used for the display of posters or other notices, shall not be interpreted as a billboard or signboard."

If a structure of metal or other material is attached to the wall of a building for the display of posters it is clearly within the definition of "billboard" in the foregoing section. If a poster is attached directly to the wall of a building without any structure being erected for the reception of the poster, such a poster would be within the exception to this section. However, even in such case frontage consents would be required for such posting for the reasons heretofore set out.

The Chicago Zoning Ordinance has such a direct relation to the subject matter here discussed that we think we should call attention to its provisions. In the zoning ordinance a "sign" is defined as follows:

"An advertisement, announcement, mark of identification or symbol attached to, painted or illuminated, directly or indirectly upon any land or building excepting the flag, emblem or insignia of a nation, political unit, school or religious group."

Posters, whether they are attached directly to buildings or are attached to structures affixed to buildings, are signs as defined above and are prohibited by the zoning ordinance from being posted in Family Residence, Duplex Residence, Group House, Apartment and Specialty Shop Districts. The securing of frontage consents does not invalidate their use in these districts. In Business Districts and the three other less restricted districts, posters are a permitted use but even here they are subject to the frontage consent provision of the code where one-half of the buildings on both sides of the street are used exclusively for residence purposes.

TRAVEL TICKET BROKERS

(No. 10790—M. H. F.—June 9, 1944.)

The municipal ordinance requiring a license for persons engaged in the occupation of selling travel tickets on a brokerage basis, does not apply to direct sales of tickets by an airline where the regular price is charged.

Citation: Municipal Code, secs. 113-17, 113-20.

OPINION OF FOREGOING SYNOPSIS

The City Clerk has forwarded to us your letter of April 24, 1944, in which you make inquiries concerning the city's ordinance licensing and regulating passenger ticket brokers. The request is made that we reply direct to you. We have also received your letter of June 7, 1944 relative to the same matter.

The above mentioned ordinance is one enacted February 9, 1944 and may be found in Chapter 113 of the Municipal Code of Chicago. It reads as follows:

"113-15. (Definitions.) The term 'passenger ticket' means any ticket or reservation, oral, written or printed for transportation of a person by a public carrier or contract carrier and includes passenger accommodation on any railroad, parlor car, sleeping car, motor vehicle, watercraft and aircraft.

"The term 'passenger ticket broker' includes:

(a) Any person who accepts a gratuity or charges or receives a commission or fee for the procurement, on behalf of another, or for the sale of a passenger ticket.

(b) Any person who purchases a passenger ticket with intent to resell it at a profit. Proof of resale at a price in excess of the amount paid by the purchaser shall be presumptive evidence of intent to resell at a profit.

(c) Any person who sells a passenger ticket at a price in excess of the published tariff charge or charges therefor.

"113-16. License—fee.) It shall be unlawful for any person to act as passenger ticket broker in any transaction without a license. The annual license fee shall be ten dollars for all or any part of a fiscal year of the city.

"113-17. Maximum charge.) It shall be unlawful for any passenger ticket broker to accept a gratuity or charge or receive a commission, fee or gross profit in excess of one dollar for any passenger ticket or tickets for one person's continuous trip in one general direction within the continental United States and Canada, excluding Alaska, by way of a public carrier or carriers.

"113-18. Dishonored tickets.) It shall be unlawful for any passenger ticket broker to sell, issue or deliver to any person a void passenger ticket or one that is not good for a continuous trip from the place of origin to the destination specified by the purchaser.

"113-19. Notice.) The person in charge of every terminal, depot, wharf, passenger agency, travel agency, bank, hotel, or passenger ticket broker's office in the city of Chicago shall cause a copy of Sections 113-15 to 113-20, inclusive, including the title thereof, and Section 113-30 of this code to be printed in the English language and posted in a conspicuous place or places where passenger tickets may be procured, sold, handled or reserved so that said provisions of this code shall be plainly legible.

"113-20. Revocation.) The mayor may revoke the license of a passenger ticket broker for a violation of any of the provisions of this code relating to the licensee."

As by its plain terms "passenger ticket" means any ticket or reservation, oral, written or printed for transportation of a person by a public carrier or contract carrier and includes accommodation on any aircraft, any passenger ticket broker who handles aircraft tickets or accommodations would be subject to the terms of the ordinance.

If an airline company does not make brokerage transactions in tickets and only makes direct sales of tickets over its own lines, and such sales are made at published tariff charges only, in our opinion it would not be subject to license.

If, however, any agent or employe of an airline company were to accept a commission or fee for the procurement, on behalf of another, or for the sale of an airline passenger ticket, such person would be amenable to license.

The notice required by section 113-19 of the ordinance should be posted in all Chicago ticket offices of the airline company and on the premises of the airline company in the Terminal Building of the Chicago Airport. We advise that this provision of the Municipal law be strictly complied with, as it is a salutary regulation designed to protect the travelling public against unlawful exactions and practices.

Copies of this opinion are being forwarded to the City Clerk, the City Collector and the Superintendent, Bureau of License.

BEAUTY SHOP

(No. 10791—Superintendent Bureau of License—M. H. F.—June 9, 1944.)

A beauty shop engaged in the practice of cutting hair is subject to license under the municipal ordinance relating to barber shops.

Citations:

Statutes: IRS '43: ch. 16¾, par. 15. Ch. 24, par. 23-91.

Ordinances: Municipal Code 107.1.

Cases: 239 Ill. 237.

252 Ill. 311, 314.

374 Ill. 384, 393.

Reference: 19 Op. Corp. Coun. 160.

OPINION OF FOREGOING SYNOPSIS

Your communication of April 27, 1944 transmits a letter from a firm of New York attorneys requesting information as to whether the city's Barber Shops ordinance is construed as being applicable to beauty parlors where only women patrons are treated, if part of the services available to women patrons is the cutting or dressing of their hair for a consideration.

By section 23-91 of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, 1943, the city has been granted express power to license, take and regulate barbers and barber shops. This authority was delegated to the city by an amendment to the Cities and Villages Act passed by the General Assembly in 1935.

By an opinion given you May 24, 1937, Opinions of the Corporation Counsel, Volume XIX, page 160, we expressed the view that notwithstanding the enactment of the State act in relation to the practice of barbering, Laws of 1909, page 98, the city was authorized concurrently with the State to tax, license and regulate barbers and barber shops. The fact that the State has legislated upon a particular subject does not necessarily deprive its municipalities of their power to deal with the same subject by ordinance. *Chicago Cosmetic Co. v. City of Chicago* (1940), 374 Ill. 384, 393; *City of Chicago v. Union Ice Cream Co.* (1911), 252 Ill. 311, 314. Furthermore, the city's Barber Shops ordinance may be viewed as one passed pursuant to the power to tax, and it is not seen that the exercise of this power would render the ordinance repugnant to the State act in relation to the practice of barbering. See *Ayres v. City of Chicago* (1909), 239 Ill. 237.

The city's Barber Shops ordinance, Chapter 107.1 of the Municipal Code of Chicago, enacted December 15, 1943, defines the term "barber shop" to mean any building, room, place or establishment wherein the occupation is carried on of shaving or trimming the beard or cutting and dressing the hair for a consideration. The ordinance enacts an annual fee based on the number of barber chairs used in the licensed premises. Presumably this fee may be justified under either the power to tax or as a police regulation under the power to license and regulate. Under that portion of the definition section which states that barber shop means any place where the cutting and dressing of hair of persons for a consideration is carried on, obviously an establishment, however characterized, and whether serving female patrons only, or both males and females, wherein the hair of patrons is cut and dressed for a consideration, comes within the purview of the ordinance and in our opinion the operator of such establishment would be subject to license under the Barber Shops ordinance. This would be so even though the establishment was denominated a beauty parlor and catered to women patrons in other respects beyond that of barbering and was licensed under the Illinois Beauty Culture Act.

Our conclusion in this respect is fortified by an examination of the State Beauty Culture Act, paragraphs 15, *et seq.*, Chapter 16½, Illinois Revised Statutes, wherein the practice of beauty culture is defined. Section 2 of said act (paragraph 16) contains the following proviso:

"However, the provisions of this Act shall not authorize any registered beauty culturist to cut or clip the hair of any person unless he has first obtained a certificate of registration as a barber under the provisions of 'An Act to regulate the pursuit of the business, art and avocation of a barber, and to insure the better qualifications of persons following such business in the State of Illinois.' approved June 10, 1909, as amended."

ARCHERY RANGE

(No. 10792—Alderman, 5th Ward—M. H. F.—June 10, 1944.)

If an archery range is operated for gain or profit, the establishment may be subject to license and regulation as a 20th class amusement under the municipal code.

Citations: Municipal Code: Secs. 104-7, 104-8.
Sec. 11(4) Chicago Zoning Ordinance.

OPINION OF FOREGOING SYNOPSIS

Replying to your letter of June 7, 1944 please be advised that the Municipal Code of Chicago does not contain a specific ordinance licensing and regulating the operation of archery ranges. If, however, an archery range is operated for gain or profit in the city as a place of amusement to or at which the public is required to pay a fee, it seems probable that the place may be subject to license and regulation as a 20th Class amusement under Chapter 104 of the Municipal Code. The license fee for this class is \$5.00 per day.

Section 104-7 prohibits amusements in any building not now devoted to such purpose within 200 feet of any hospital. While some difficulty might be met with on account of the inclusion of the word "building", in the section, it would be advisable to ascertain the distance between the proposed range premises and the Illinois Central Hospital.

Section 104-8 prescribes that no person shall produce, offer, present or carry on any amusement (except of the 7th or 10th class, with which you are not concerned) on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property owners according to frontage on both sides of such street in such block. The frontage consents are required to be obtained and filed with the Department of Buildings before a license shall issue for the amusement.

With reference to the matter of zoning our investigation shows that the proposed premises are within an apartment house district. The Zoning Ordinance does not permit the use of property for an archery range within such district. Archery ranges are lawful only within commercial, manufacturing or industrial districts. (Section 11(4), Chicago Zoning Ordinance.)

Assuming that you are interested in preventing the location of the archery range at the site mentioned, it would be advisable to suppress the earliest attempt to install archery range equipment. A few years back the city became involved in vexatious litigation with the operators of an archery range which was permitted to be established on Hyde Park Boulevard, west of the Chicago Beach Hotel. The promoters of the new range may contemplate operating for the summer months under the cloak of a temporary injunction.

LICENSING WHOLESALE TOBACCO HOUSE

(No. 10819—City Comptroller—M. H. F.—October 13, 1944.)

The proper annual license fee for those engaged in the wholesale tobacco business, cutting and packing tobacco for resale is as follows:

Not more than three persons	\$100.00
More than three persons	\$250.00

Citation:

Municipal Code, Secs. 178-1, 178-4.

OPINION OF FOREGOING SYNOPSIS

Your letter of October 10, 1944, requests our opinion as to what is the proper annual license fee to be exacted from individuals engaged in the wholesale tobacco business who cut tobacco into pieces suitable for pipe smoking, pack the same into containers and sell it for resale, five persons being engaged in these operations.

Section 178-1, the definition section of the wholesale tobacco dealers' ordinance, reads as follows:

"The term 'wholesale tobacco dealer' is hereby defined to mean any person making, manufacturing, or jobbing cigars, or selling, offering for sale, exposing for sale, or keeping with the intention of selling or exchanging at wholesale, any tobacco, snuff, cigars, cigarettes or cigarette papers, including leaf tobacco, or any preparations containing tobacco."

Section 178-4, the fee section, fixes the annual license fee for a wholesale tobacco dealer making or manufacturing cigars exclusively and selling or dealing only in such cigars; also fixes the fee for a wholesale tobacco dealer dealing only in cigar leaf tobacco, and then provides as follows:

"The annual license fee for every other wholesale tobacco dealer, as defined in section 178-1, shall be based on the number of persons engaged, as follows:

Not more than 3 persons.....	\$100.00
More than 3 persons.....	250.00

No license shall be issued for a sum less than the full annual license fee."

Under the facts stated the individuals mentioned come within the definition of wholesale tobacco dealer. As they do not deal exclusively in cigars or cigar leaf tobacco, they would, in our opinion, come within the above quoted portion of the fee section and be subject to an annual license fee of \$250.00.

RESTAURANT LICENSE

(No. 10822—City Comptroller—M. H. F.—November 6, 1944.)

A catering company operating a cafeteria in a building open only to persons in the building who are employed by agencies of the federal government is serving food to the general public and is subject to license under the city's food dispensers' ordinance.

Citation: Municipal Code, 130-15, 130-16.

OPINION OF FOREGOING SYNOPSIS

We have been withholding our reply to your letter of October 10, 1944, awaiting the receipt of further particulars as to the operation of the cafeteria in the building at 366 W. Adams Street. These have now been furnished in a letter dated November 6, 1944, from the Superintendent of the Bureau of License.

It now appears that the restaurant or cafeteria is one operated by a catering company, as lessee of premises in the basement of the above mentioned building, which building is occupied by the Army War Bond Office, the Supply and Service Office of the Finance Department, and other agencies of the United States Government, and that food is dispensed in the cafeteria to all employees of such agencies.

While the company operating the cafeteria may in a sense have a limited clientele, when it serves food for profit generally to any and all employees of all tenants of the building, it is, in our opinion, serving food to the general public so as to make it subject to license under the city's food dispensers' license ordinance.

The catering company operating the cafeteria, rather than the owner of the building or any agency tenant, is the person subject to license.

PROJECTION MACHINE OPERATOR

(No. 10823—Commissioner Streets and Electricity—M. H. F.—November 13, 1944.)

An apprenticeship served outside the City of Chicago is acceptable by the city as a qualification for a license as a motion picture projecting machine operator.

Citations:

Ordinances: Municipal Code. 155-10, 155-16, 155-17.

Other reference: 18 Op. Corp. Coun. 536.

OPINION OF FOREGOING SYNOPSIS

Your communication of October 24, 1944, invites our attention to sections 155-10, 155-16, and 155-17 of the Municipal Code of Chicago, and

requests our opinion as to whether or not any apprenticeship served outside the City of Chicago is acceptable as qualification for a license as a motion picture projecting machine operator.

The sections referred to read as follows:

"155-10. Qualifications.) An applicant for a license as a motion picture projecting machine operator shall be twenty-one years of age or over, and shall have served as an apprentice to a regularly licensed motion picture projecting machine operator for a period of not less than one year in conformity with section 155-16, or shall have heretofore served as a motion picture projecting machine operator for a period of not less than one year, satisfactory proof of which service shall be furnished to the commissioner of streets and electricity."

"155-16. Apprentices.) It shall be unlawful for any person to act as an apprentice to a motion picture projecting machine operator in the handling, repairing, or manipulating of a motion picture projecting machine or device without first obtaining a permit from the commissioner of streets and electricity to act as such."

"155-17. Apprentice permits.) Said commissioner of streets and electricity shall issue such apprentice permit upon the payment of ten dollars to the city collector, if the applicant for the same is not less than twenty-one years of age and presents to the said commissioner of streets and electricity a letter from a regularly licensed motion picture projection machine operator and the proprietor of some place of amusement or other enterprise regularly licensed to conduct motion picture shows or to operate motion picture projecting machines or devices. The said letter must state that such applicant for a permit, upon the issuance of such permit, will be regularly employed as an apprentice by the person writing such letter. It shall be the duty of the commissioner of streets and electricity to pass on the qualifications of all applicants for permits to act as apprentices to licensed operators.

"Upon the issuance of such permit, which shall state the place of employment of the holder thereof, the person obtaining the same may act as such apprentice and shall be permitted to enter the booth containing a motion picture projecting machine or device at the designated place of employment, but the operation of such motion picture projection machine or device shall not be conducted by him during an exhibition open to the public."

The question which you propound was presented to the department in the year 1931 by the then commissioner of gas and electricity and on September 29, 1931, we rendered an opinion expressing the view that an applicant's apprenticeship need not necessarily be served in the City of Chicago. Opinions of the Corporation Counsel, Volume XVIII, page 536. A copy of this opinion is transmitted herewith.

Section 155-10 of the Municipal Code of Chicago is not materially different from section 3541 of the Revised Chicago Code of 1931, which was the basis of our opinion given in 1931, to which opinion we are constrained to adhere. You are, therefore, advised that an applicant for license as a motion picture projecting machine operator who is twenty-one years of age or over, and who has served as an apprentice to a regularly licensed motion picture projecting machine operator for a period of not less than one year, whether or not such service was rendered within or outside the City of Chicago, should be considered an acceptable applicant for examination and license, upon submission of proof to you of such service.

The city should lose nothing substantial in the way of qualification requirements by this interpretation of the section as every applicant for license is required to be examined pursuant to the provisions of section 155-12 and demonstrate his competency and fitness for a license. To construe section 155-10 so as to prevent an otherwise qualified applicant from taking the examination until he had served an apprenticeship in Chicago might subject the ordinance to attack on the ground that it transgressed constitutional guarantees of due process and equal protection of the laws.

USE OF MAILS BY PAWNBROKERS

(No. 10831—City Collector—M. H. F.—January 4, 1945.)

A pawnbroker licensed under the Municipal Code of Chicago could not meet the requirements of the City's ordinance if he were to carry on his business through the mails.

Citations:

- Statute: IRS '43, ch. 24, sec. 23-54.
- Ordinances: Municipal Code, ch. 159-7, 10, 13, 15.
- Cases: 111 Ill. 291.
118 Ill. 632.

OPINION OF FOREGOING SYNOPSIS

Your communication of November 16, 1944, quotes a letter received by you from a Chicago attorney stating that a client intends to start a pawnbroking business in Chicago specializing in loaning money on stamp and coin collections. It is said the client expects to solicit business throughout the United States by means of advertising in newspapers and magazines and that when the business is carried on through the mails it would be impossible to comply with the provisions of the city's pawnbrokers ordinance requiring the pawnbroker to deliver to the pledger, at the time of making the loan, a memorandum or note signed by him containing an accurate account and description of the article or thing pawned and pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on the loan and the name and address of the pledger. Our opinion is requested (1) as to whether it would be in violation of the city's ordinance for a pawnbroker to conduct his business through the mails, and (2) whether the United States mails could be construed as the pledgor's agent for the purpose of receiving the memorandum of the pledge.

Municipalities in Illinois possess broad powers over pawnbrokers. By section 23-54 of the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes, express power is granted to license, tax, regulate, or prohibit pawnbrokers. While a city has no power to determine who is or who might be a pawnbroker (*City of Chicago v. Hulbert*, 118 Ill. 632), it is purely discretionary with a city whether it will license and regulate the business of pawnbrokers, or wholly prohibit and suppress business by them, and if a license is granted such conditions and burdens may be imposed as the city sees fit. (*Launder v. City of Chicago*, 111 Ill. 291.)

Pursuant to the grant of power given by section 23-54 of the Revised Cities and Villages Act the City of Chicago has enacted its ordinance

licensing and regulating pawnbrokers, chapter 159, Municipal Code of Chicago. In addition to those sections defining the term pawnbroker, requiring a license, fixing the amount of the annual license fee, and providing for the posting of a bond conditioned for the observance of the ordinance provisions, the chapter contains several regulatory sections among which are those relating to interest charges, record of pledges and purchases, report to police, inspection of record, memorandum to pledger, exhibition of article pledged, hours of business, sale and redemption of pledged articles, prohibited pledges or purchases, employees under 16, and penalty. The following sections may have pertinency to the questions propounded:

"159-10. Memorandum to pledger.) Every such licensee shall at the time of each loan deliver to the person pawning or pledging any goods, article, or thing, a memorandum or note signed by him containing the substance of the entry made in his book as required by this chapter; and no charge shall be made or received by any pawnbroker or loanbroker or keeper of a loan office for any such entry, memorandum, or note."

"159-13. Hours of business.) No such licensee shall receive on deposit or pledge any personal property or other valuable thing, or shall buy any second-hand article or thing, before the hour of six a. m. or after the hour of eight p. m. during the months of January, February, March, April, October, November and December of each year; nor before the hour of five a. m. or after the hour of nine p. m. during the months of May, June, July, August, and September of each year."

"159-15. Prohibited pledges or purchases.) No such licensee shall take or receive in pawn or pledge, for money loaned, or shall buy any property, bonds, notes, securities, or other valuable thing from a minor, or shall so take, receive, or buy any such property, the ownership of which is in, or which is claimed by, any minor, or which may be in the possession or under the control of any minor."

"No such licensee shall take any article in pawn or buy from any person appearing to be intoxicated, nor from any person known to be a thief or to have been convicted of larceny or burglary, and when any person is found to be the owner of stolen property which has been pawned or bought, such property shall be returned to the owner thereof without the payment of the amount advanced by the pawnbroker thereon or any costs or charges of any kind which the pawnbroker may have placed upon the same."

While the ordinance contains no specific provision requiring that the pawnbroking business be conducted exclusively by contracts made in person between the pawnbroker and the pledger, when the ordinance as a whole is read a rather positive inference may be drawn from it to the effect that a pawnbroker licensed under it could not comply fully with its provisions were he to conduct his business through the mails. Furthermore, it is not seen how a pawnbroker licensed under the city's ordinance could conduct his business with safety to himself except by personal contacts with the persons pawning or pledging articles with him, as otherwise he might not be able to tell whether such persons were minors, thieves or intoxicated persons.

Our opinion, therefore, is that a pawnbroker required to be licensed under Chapter 159 of the Municipal Code of Chicago could not meet the requirements of the city's ordinance and therefore lawfully carry on his pawnbroking business within the city were he to transact such business through the mails.

In order to make the ordinance specific in the matter herein discussed it is recommended that it be amended so as to incorporate in section 159-15 a provision expressly prohibiting the conduct of the business through the mails. And, when the ordinance is being amended, it would also be advisable to amend section 159-7 to require the keeping of a record of the description of the pledger, and section 159-10 so as to provide that the memorandum given the pledger state the rate of interest charged expressed in percentage. Draft form of ordinance making these amendments is transmitted herewith for your consideration.

FLORIST LICENSE

(No. 10846—City Comptroller—M. H. F.—June 7, 1945.)

A person selling at retail in the city, tomato, cabbage, onion or similar vegetable plants is not subject to license as a retail florist under the Municipal Code.

Citations:

Ordinance: Municipal Code, ch. 128.1.

Case: 166 Tenn. 346, 61 S.W. 2d. 469.

OPINION OF FOREGOING SYNOPSIS

The communication of the Superintendent of the Bureau of License dated June 4, 1945 requests our opinion as to whether or not a person engaged in selling at retail in the city tomato, cabbage, onion or similar vegetable plants is subject to Retail Florist license under Chapter 128 of the Municipal Code of Chicago.

The chapter referred to provides for the licensing and regulation of retail florists. Section 128.1, the definition section, reads as follows:

"The term 'retail florist' means any person engaged in the business of selling, offering for sale, or keeping with the intention of selling at retail flowers, bridal bouquets, funeral designs, or growing plants."

A reading of the ordinance evidences to us the intention of the City Council to license and regulate florists only, not dealers in vegetables or vegetable plants. As defined by lexicographers the word florist is derived from the Latin word *flos*, meaning flower. (Century Dictionary.) It means a cultivator of, or dealer in, ornamental flowers or plants. (Webster's New International Dictionary); one engaged in floriculture; a cultivator of, or dealer in, ornamental flowers and plants. (Corpus Juris Secundum, p. 1031.) The term has been defined by statute as one who conducts the business of selling cut flowers and potted plants at a store or fixed place. (*Doran v. Crenshaw*, 166 Tenn. 346, 61 S. W. 2d 469.) Floriculture is defined as the cultivation of flowers or flowering plants. (Century Dictionary); the cultivation of ornamental flowering plants. (Webster's New International Dictionary).

While the term "growing plants" broadly considered may include living organisms, such as vegetables, trees, shrubs and herbs, when used in the ordinance definition in association with flowers of the ornamental

kind, we may reasonably resort to the ejusdem generis or noscitur a sociis rule and interpret the term growing plants as potted plants of the decorative and nonedible variety rather than plants of the vegetable genus, cultivated for food.

As tomato, cabbage, onion or similar vegetable plants are obviously not of the same kind or class as potted decorative plants, our opinion is that persons engaged in selling at retail such vegetable plants, who do not also deal in flowers, bridal bouquets, funeral designs or decorative potted plants, are not subject to license as retail florists under Chapter 128 of the Code.

STORAGE OF INFLAMMABLE LIQUIDS

(No. 10848—City Comptroller—M. H. F.—July 16, 1945.)

The airline companies who store gasoline and other inflammable liquids for use in their transportation business at the Municipal Airport are amenable to provisions of the Municipal Code subjecting them to license and regulation for storage of inflammable liquids.

Citations:

Ordinances: Municipal Code, ch. 129.1.

Other references: 18 Op. Corp. Coun. 680, 780.

21 Op. Corp. Coun. 160.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 6, 1945 requests our opinion whether or not the tenants of the Chicago Municipal Airport who store flammable liquids for use in their business are subject to Chapter 129.1 of the Municipal Code of Chicago. From the fact that you enclose copies of the Airport Agreement and the Hanger Site Agreement, entered into between the city and certain airline companies under day of April 1, 1942, indicates to us that the tenants referred to are the airline companies, lessees under these agreements.

Chapter 129.1, entitled "Storage and Handling of Flammable Liquids", subjects to license and regulation all persons (other than those licensed under other provisions of the Municipal Code) who keep on hand or store for use in any business any flammable liquid having a flash point below 187° Fahrenheit or 86° Centigrade. The airline companies and other municipal airport tenants are not exempted from the provisions of the chapter.

This ordinance is an exercise of the city's police power or governmental functions; designed to protect life and property against the hazards of fire and explosion. It affects alike and is general and uniform in its operations upon all stores of flammable liquids subject to its terms.

The Airport Agreement and the Hanger Site Agreement entered into with the airline companies grant to such companies, as lessees, certain rights and privileges among which are those of making occasional sales (not to be construed as authorizing the conduct of a separate business)

of gasoline, oil, etc.; the servicing by the lessees of their aircraft; the procurement of supplies; and the maintenance of storage facilities for gasoline, oil, greases and other fuel and lubricants; but by Article III of the Airport Agreement it is expressly provided that nothing contained therein shall impair the right of the city, in the exercise of its governmental functions, to require a lessee to pay any tax or inspection fees, or to procure any permit or license, provided such requirement is imposed on activities or persons generally and not primarily directed at, or primarily affecting the operations of, scheduled air transport operators using the airport in the conduct of their transportation business. This specific provision in our opinion would preclude any airline company from exempting itself from the licensing and regulating requirements of Chapter 129.1. The Hanger Site Agreement is made subject to and conditioned upon the proper observance and performance of the covenants and provisions contained in the Airport Agreement, and both the Airport Agreement and the Hanger Site Agreement are agreements entered into by the city in its proprietary, rather than its governmental, capacity.

Our conclusion therefore is that the airline companies who store gasoline and other flammable liquids for use in their transportation business are amenable to Chapter 129.1 of the Municipal Code.

In an opinion given you July 24, 1941 (Opinions of the Corporation Counsel, Volume XXI, p. 160), before the making of the Airport and Hanger Site Agreements of April 1, 1942, and prior to the enactment on December 15, 1943 of Chapter 129.1, we expressed the view that an airline company, lessee of municipal airport premises, was subject to license and regulation under the city's Filling Stations license ordinance, in case it wished to engage in the filling station business. In fact on numerous occasions enforcing departments have been advised that persons leasing municipally owned or controlled premises for the purpose of conducting thereon businesses subject to license and regulation were not exempt from complying with general license ordinances applicable to the businesses. (Opinions of the Corporation Counsel, Volume XVIII, pp. 680 and 780.)

LICENSE FEES

(No. 10872—Chairman, Board of Examiners, Mason Contractors—
M. H. F.—December 4, 1945.)

A mason contractor who allowed his license to lapse and has not paid any fees for ten years is not entitled to renew his former license. Such person must obtain a new license and pay the required fee therefore.

Citations:

Statute: IRS '45, ch. 24, sec. 22-43 to 22-48.

Ordinance: Municipal Code, 151-5, 151-6.

Other references: Coun. J. p. 1018, Dec. 18, 1943.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of a letter from a mason contractor, in which he states that in the year 1925 he was qualified as a mason contractor and for five or six years during which he did work in Chicago he paid the annual

license fee of \$25.00; that from 1930 until 1933 he did not take out licenses as he did no mason work in Chicago; that in 1933 he took out a license for that year and part of the year 1934, that about three weeks prior to the date of his letter he tendered a check to you in the amount of \$27.50 for the renewal of a license numbered 2466 (presumably his old license number); and that you refused to accept the check, stating that if he wished to renew his old license he would have to pay all back fees to date, amounting to \$275.00, or as an alternative that he might apply for a new license and pay an original fee of \$110.00.

Having paid the sum of \$110.00 for a new license, he now seeks the return of \$82.50 being the difference between \$110.00 and \$27.50. Our opinion is requested as to whether he is entitled to the refund.

The Mason Contractors license ordinance, contained in chapter 151 of the Municipal Code of Chicago, is the ordinance involved. Subject to certain exceptions not pertinent to the instant inquiry it requires every person engaged in or desiring to engage in the business of masonry or mason work, in the city, to submit to an examination as to his qualifications and competency and obtain a license. The fee section (151-5) exacts a fee for the examination of \$100.00, which includes the first year's license. Thereafter the annual license fee is \$25.00. By the ordinance passed December 18, 1943 (Coun. J. p. 1018) these fees were increased 10 per cent in amount. The license period is fixed by section 151-6 at one year from date of issuance of license, and this section provides that the license may be renewed upon its expiration by paying in advance the annual renewal fee.

The city's ordinance is patterned after and in furtherance of sections 22-43 to 22-48, inclusive, of the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes.

Inasmuch as he allowed his license to lapse and has not paid any renewal fees since the year 1934 our opinion is that he is not entitled to now renew his former license upon the payment of \$27.50, but that you have properly required him to procure a new license and to pay the initial fee of \$110.00.

LAUNDERETTES

(No. 10882—M. H. F.—January 8, 1946.)

Operators of "laundrette" establishments are subject to a license under the City's laundry license provisions as found in the Municipal Code.

Citations: Municipal Code, 145-1, 145-4

OPINION OF FOREGOING SYNOPSIS

You have informed us that your company is interested in the installation in the City of Chicago of so-called laundrettes, or establishments wherein a number of coin operated or controlled Bendix washing machines are placed for use by the general public for the laundering of sundry articles. You state that a person having articles to be washed will bring

them into one of these establishments, have the articles weighed into lots not exceeding ten pounds dry weight, be assigned to one of the washing machines, and that the customer will place the articles in the machine, deposit in the coin slot a 25¢ piece, and after a cleaning cycle lasting thirty minutes remove the articles from the machine. It is said that the washing cycle takes approximately twelve minutes after which three rinsing processes occur, followed by an extracting process which removes approximately eighty percent of the moisture from the articles. It is also said that establishment employees do the weighing on scales provided for that purpose, and in the event the customer should not be on hand to remove the articles from an assigned machine at the end of the thirty minute period that an employee of the establishment will remove them and place them in a bag or other container to await the customer's return. Each establishment it is expected will have twenty or more individual machines, the maintenance and operation of which will be under the direction of not more than three employees. You further inform us that you have in prospect the installation of drying facilities for use by customers. You request our advice as to whether the establishments mentioned are subject to regulation and license under the city's laundries license ordinance, Chapter 145 of the Municipal Code of Chicago.

Section 145-1 of the above mentioned ordinance, which is the definition section, provides in part as follows:

"The word 'laundry' is hereby defined as any place, building, structure, room, establishment, or portion thereof, which is used for the purpose of washing, drying, starching, or ironing shirts, dresses, underwear, collars, cuffs, or other wearing apparel, table, bed or other household linens, towels, curains, draperies or other washable fabrics, such work being done for the general public."

The license required section provides that no person shall engage in the business of any laundry within the city without first obtaining a license so to do.

Section 145-4 prescribes an annual license fee for each laundry based on the number of persons engaged in marking, sorting, washing, drying, starching or ironing wearing apparel, household linens, towels, bedding, or other fabrics, which fee is graduated in amounts between \$25.00 where not more than three persons are engaged to \$150.00 where more than one hundred persons are engaged. Other sections of the ordinance relate to sanitary conditions, light requirements, ventilation, plumbing and draining facilities, toilet, lavatory and locker room facilities, hours of operation, separation of laundered and unlaundered articles, sterilization of articles, etc.

Obviously any one of these proposed establishments would come within the purview of the ordinance as being a place where articles of wearing apparel, household articles, etc., are washed for the general public, and any person engaged in conducting one of the establishments would in our opinion be required to obtain a license and pay the prescribed license fee.

OIL STORAGE PERMIT

(No. 10911—City Comptroller—M. H. F.—September 21, 1946.)

A person who leases a building for the purpose of subletting it to other tenants is in "business", as defined in the Municipal Code. Such person when keeping fuel oil stored in the building for heating purposes subjects himself to the provisions of the ordinance requiring a license for storage of oil used in a business.

Citations:

Statute: IRS '45. Ch. 24, Sec. 23-75.

Ordinances: Municipal Code, 172-1, 172-20.1, 172-20.4.

Cases: 220 U.S. 107.

285 Ill. 595.

297 Ill. 29.

345 Ill. 366, 370.

OPINION OF FOREGOING SYNOPSIS

Your communication of September 17, 1946 states that an individual who is the lessee of a building at 2435 Indiana Avenue, sublets the building to two corporations, and that under his leases the individual is required to heat the premises demised to and occupied by the tenant corporations. For this purpose he has installed a fuel tank having a capacity of 1500 gallons for the storage of #5 fuel oil. Our opinion is requested as to whether the individual is subject to license under the city's Fuel Oil Storers ordinance, Sections 172-20.1 to 172-20.4, inclusive, of the Municipal Code of Chicago.

This ordinance is contained in Chapter 172 of said code, section 172-1 of which defines the term "fuel oil storer" to mean "any person who keeps on hand or stores fuel oil for use in any business but not for resale."

Section 172-20.1, the license required section, provides as follows:

"It shall be unlawful for any person to keep on hand or store fuel oil for use in any business without first procuring a license so to do for each location, place, or premise where such person keeps on hand or stores for use any such fuel oil."

Other sections cover the matter of the application for license; fix the amount of the license fee, which is graduated according to the total capacity of storage containers or tanks; and set forth regulations designed to neutralize the fire and explosion hazards involved in the storage and use of fuel oil as a flammable liquid. The ordinance is an exercise of the city's express power granted by Section 23-75 of the Revised Cities and Villages Act to regulate and prevent the storage of combustibles.

Admittedly the individual concerned keeps on hand or stores fuel oil for use in heating the premises of his tenants. If then the operation of the building and the leasing of all or portions of the building to the tenants constitutes business or the transaction of business, the individual concerned in such business would be amenable to the ordinance and required to procure a license under it.

In *Flint v. Stone Tracy Co.* (1910), 220 U. S. 107, a case involving the corporation tax law, the court held that the word "business"

is a very comprehensive term and embraces everything about which a person can be employed, and that corporations engaged in such activities as leasing and managing property and collecting rents are engaged in business within the meaning of the law.

Storrs v. Industrial Commission (1918), 285 Ill. 595, a case involving the Illinois Workmen's Compensation Act, holds that one who is engaged in the managing, maintaining and keeping in repair several buildings, is engaged in business within the Act.

In *Walsh v. Industrial Commission* (1931), 345 Ill. 366, another Workmen's Compensation case, plaintiff in error's chief contention was that while he owned or was interested in buildings in the city of Rockford which he rented and repaired he was not engaged in the business of maintaining the structures. The court, however, decided against him and on page 369 of its opinion said:

"The business, therefore, of maintaining a structure is the business of holding and keeping the same in repair. The term "business", in common parlance, means an employment which occupies a substantial portion of the time and attention of one engaged in it."

On page 370 the court said:

"The line of demarcation between maintaining a structure as an incident rather than as a business, and the business of maintaining a structure, is not readily defined, but we are of the opinion that a safe rule is, that where one maintains buildings or structures for profit, whether that profit be as compensation for his services or by way of rentals received, and such maintenance requires a substantial portion of his time and attention, he must be said to be engaged in the business of maintaining a structure within the contemplation of the Workmen's Compensation act."

Were the individual concerned to contend that he was engaged in some other business and therefore he was not engaged in business when he maintained the Indiana Avenue building, such a contention probably would not aid him, as the courts have held that a man may engage in plural kinds of business. In support of its opinion in the Walsh case the Supreme Court cited the case of *Davis v. Industrial Commission* (1921), 297 Ill. 29, which refuted the contention that the litigant Davis was not in the business of maintaining and renting buildings because his main business was the hardware business.

Relying upon these and other authorities which interpret the word business and define the meaning of the term doing business, our opinion is that the person mentioned in your inquiry is engaged in business when he rents a building and leases it or portions of it out to tenants, and that when he keeps on hand or stores fuel oil for use in the heating of the building, he stores it for use in a business, and thereby subjects himself to the license requirements of the city's ordinance.

MAGAZINE SOLICITORS

(No. 10919—J. H. S.—October 14, 1946.)

A person may not solicit subscriptions on the sidewalks without first obtaining a license.

Citations:

Ordinance: Municipal Code, Sec. 36-49.1.

Cases: 268 U.S. 325.

316 U.S. 52, 54.

363 Ill. 619.

Other references: Coun. J. p. 2228, May 14, 1934.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of October 9, 1946 together with brief in support of request of your client for noninterference by the Police Department. The brief states that your client is a citizen of California and is engaged in the solicitation of subscriptions for magazines. At present he is engaged by two residents and citizens of California to solicit orders for subscriptions to a magazine published in Los Angeles known as "Sports Digest." He operates through a crew of solicitors in various states of the union. Solicitation for orders for subscriptions is done on the public sidewalks. If a subscription is obtained, it is sent to Los Angeles where it is filed and the magazine is delivered in due course from there.

You state that on the evening of Tuesday, September 24, 1946, the police arrested six members of the crew on State street in the Loop and booked them for violation of section 36-49 of the Municipal Code of Chicago. On Wednesday, September 25, 1946, Judge Clorfene of the Municipal Court of Chicago discharged the defendants on the ground that that section did not apply to the defendants. However, the court instructed the police to file charges of disorderly conduct if the defendants were apprehended again in soliciting subscriptions and indicated that if they were brought before him on those charges he would find them guilty.

In your brief you urge that the City of Chicago cannot require him to secure any license or permit as a prerequisite to soliciting subscriptions for a magazine published and shipped from without the State of Illinois on the ground that his activities are protected by the Commerce Clause of the Federal Constitution. In support of this contention you cite *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325. You further urge that aside from the question of interstate commerce, the City of Chicago cannot consider an act a nuisance or disorderly conduct when it is not in fact disorderly conduct.

You request that we advise the Commissioner of Police that he should not interfere with the solicitors.

It is our opinion that the activities of your client and his crew are in violation of section 36-49.1 of the Municipal Code of Chicago (which appears immediately following section 36-49, the section which your clients were charged with violating). Section 36-49.1 provides:

"No person shall sell, offer or expose for sale, or solicit any person to purchase any article whatsoever, except daily newspapers, on any public way or other public place within the districts heretofore or hereafter designated by the city council; provided, that the mayor may in his discretion authorize the superintendent of compensation to issue temporary permits to street vendors authorizing them to sell toys and novelties within the said districts between the 15th day of December and the 25th day of December of each year."

One of the districts designated by the city council is that bounded on the north by the Chicago River, on the south by the south line of Roosevelt Road, on the east by Lake Michigan, and on the west by the Chicago River (Proceedings of the City Council, May 14, 1934, page 2228).

The above ordinance was upheld against attack on various constitutional grounds in *City of Chicago v. Rhine*, 363 Ill. 619 (1936). In that case the defendant was charged with a violation of the ordinance because he offered for sale magazines in front of 22 S. Clark Street which was within the prohibited district. The court upheld the ordinance upon the well settled principle that no person has any inherent right to operate his business in or upon the streets of the city.

So far as the Federal Constitution is concerned, it does not restrict local government in the exercise of its police powers from imposing non-discriminatory restriction which may affect interstate commerce. The case upon which you rely did not involve solicitation upon the streets of the city, but affected solicitors who were engaged in house to house canvassing. The Supreme Court of the United States in *Valentine v. Chrestensen*, 316 U. S. 52 (1941) recognized the paramount power of local government with respect to persons who seek to make use of the public ways in the pursuit of their business. In that case the court upheld an ordinance of the City of New York prohibiting the distribution of handbills soliciting visitors to a submarine which he exhibited for profit. The court said (page 54):

"Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct."

The inherent fallacy in your brief is that it fails to take into consideration the fundamental principle that no person has an inherent right to use the public ways of the city for the pursuit of his occupation notwithstanding that he is engaged in interstate commerce. The United States Supreme Court has consistently upheld the right of local authorities to regulate and tax businesses such as telegraph companies and transportation companies engaged in interstate commerce which use the public ways of the state. These businesses do not enjoy the same freedom from interference by local authority that is enjoyed by businesses that are operated on private property.

Whatever rights your client may enjoy by reason of the interstate character of his business, he does not have the right to solicit subscriptions within the district defined by the city council. Should he persist in such activity, he will be subject to prosecution for violation of section 36-49.1.

HORSE SHOW

(No. 10923—City Comptroller—M. H. F.—October 30, 1946.)

The fact that the corporation managing the Coliseum is the holder of a class 10 amusement license would not relieve the Horse Show Association, a separate corporation, from the necessity to procure a horse show or 12th class amusement license.

Citation:**Ordinance:** Municipal Code, 104-2.**OPINION OF FOREGOING SYNOPSIS**

The letter of the Superintendent, Bureau of License, of even date herewith, requests our opinion as to whether an association which proposes to conduct a horse show in the Coliseum, at 1445 to 1513 S. Wabash Avenue, for a ten day period between November 1 and November 10, 1946, inclusive, is required to have a Class 12 Amusement license. He calls our attention to the fact that the corporation which operates the Coliseum building and which is leasing the premises to the horseshow association, has procured an Amusement Class 10 license for these premises.

Section 104-2 of the Amusements ordinance, Chapter 104 of the Municipal Code of Chicago, divides amusements into twenty classes. The 10th and 12th Classes read as follows:

10th class. All baseball, football, basketball, hockey, tennis, and bowling matches or tournaments, bicycle races, ice skating, billiard and pool matches or tournaments, track and field games, or other athletic contests or exhibitions of like character.

12th class. Poultry shows, horse shows, stock shows, flower shows, dog shows, cat shows, automobile shows, business and business appliance shows, industrial and trade shows, electrical and mechanical shows, exhibits or contests of balloons or aeronautic devices, or any similar amusement intended to represent any sport, art, or science, or the progress and development of the same.

As horse shows are specifically mentioned and included within the 12th Class and not included within the 10th Class, our opinion is that the association is subject to a 12th Class Amusement license.

The fact that the corporation operating the Coliseum is the holder of a Class 10 license for the same premises would not relieve the horseshow association, a separate corporation, from the necessity to procure a horse-show or 12th Class license.

POTATO WASHING BUSINESS

(No. 10924—City Comptroller—M. H. F.—November 1, 1946.)

A company engaged solely in the business of washing potatoes is subject to regulation and license under the City's Wholesale Food Establishment Ordinance.

Citations:**Statute:** IRS '45, ch. 24, 23-63, 23-81, 23-105.**Ordinance:** Municipal Code, 130-33, 130-41.**Cases:** 330 Ill. 97.

344 Ill. 597.

374 Ill. 384, 392.

282 Ill. App. 337, 341, 342.

286 Ill. App. 25.

Other Reference:

18 Op. Corp. Coun. 522.

OPINION OF FOREGOING SYNOPSIS

The Superintendent of the Bureau of License has requested our opinion as to whether or not a concern engaged in the business of washing potatoes is subject to license under the city's Wholesale Food Establishments ordinance, Sections 130-33 to 130-41 of the Municipal Code of Chicago. With his requests he transmits a letter from attorneys representing the concern which letter purports to set forth the nature and extent of the business conducted by it. The attorneys' letter states that their client operates an establishment at 95th Street and Cottage Grove Avenue wherein it handles potatoes that are shipped to it by wholesalers in quantities of carloads and truck loads, in bags of one hundred pounds each, for the sole purpose of cleaning the potatoes; that the potatoes are cleaned by washing with water only; that they are unloaded when received at the establishment, the strings that tie the ears of the bags are cut and the potatoes are dumped into a hopper and passed through machinery which washes the dirt from them by means of water sprays and bristled brushes; that the moisture is then removed with the aid of a drying process; that observed rotted potatoes are sorted out; and that the potatoes are thereafter re-bagged, the bags resewed and reweighed, and placed in a car or truck for return to the owners.

Section 130-33, the definition section, provides in part as follows:

"The term 'wholesale food establishment' is hereby defined to mean any building, room, stand, enclosure, premises, place, or establishment used for the preparation, manufacture, canning, bottling, packing, distribution, selling, or offering or keeping for sale at wholesale, any article of food, confection, condiment, or drink used or intended for human consumption, or any such article which is an ingredient of, used for, mixed with, or which enters into the composition of any such food, confection, condiment, or drink; * * *"

Other sections prescribe sanitary requirements and provide for periodic inspections by the Board of Health to determine whether the regulations of the code relating to health, sanitation and safety are being complied with.

The ordinance is an exercise of the city's express powers conferred by the following sections of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes:

23-63, to regulate the sale of all beverages and food for human consumption, and to locate and regulate the places where and the manner in which any beverage or food for human consumption is sold; 23-64, to provide for and regulate the inspection of all food for human consumption; 23-81, to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease; and 23-105, to pass and enforce all necessary police ordinances.

The validity of the ordinance has been upheld by the courts in the case of *City of Chicago v. Arbuckle Bros.* (1931), 344 Ill. 597, and in *City of Chicago v. Great A. & P. Tea Co.* (1935), 282 Ill. App. 337; appeal to Supreme Court denied 286 Ill. App. 25.

In the last mentioned case, in its attempt to escape compliance with the ordinance, it was contended by the A. & P. Tea Co. that it related solely to the regulation of the sale of foodstuffs and the manner and place of selling the same. That company operated in Chicago, in addition to its retail chain stores, two large establishments used for the preparation of articles of food, from which it distributed to its retail outlets. It was

argued that as no sales were made from these large establishments they were not subject to license under the Wholesale Food Establishments ordinance. The court, however, rejected the contention, saying (p. 341):

"Counsel for defendant says that these sections 'relate solely to the regulation of the sale of foodstuffs and the manner and place of selling the same.' We think this contention cannot be sustained."

And on page 342 the court said:

"It will be noticed that the ordinance is not limited to the selling of foods for human consumption but it also provides for the *preparation, packing* and distribution of such foods for human consumption." (Italics ours.)

The attorneys for the potato washing company in the instant matter point out that at no time does their client have title to the merchandise. They contend that the ordinance should be read as a whole, and when so read it should be construed to be applicable only to those who offer or keep for sale at wholesale food or food products. They seek to overcome the use of the word "preparation" contained in the definition of "wholesale food establishment" by reading it in connection with the words "offering or keeping for sale at wholesale," so as to refer only to the wholesaler who sells the washed potatoes. What the court said in its opinion in the A. & P. Tea Co. case, after considering the whole of the ordinance, refutes this contention. When the potato concern maintains an establishment in Chicago wherein it washes foodstuffs (potatoes), it comes within the purview of the city's ordinance. That it does not have title to the potatoes is obviously immaterial. In exercising its authority under its delegated grants of power the city is not limited to the regulation of the handlers of foodstuffs who have legal title thereto. Were it thus restricted the chain of salutary regulation would be broken and the city's efforts thwarted in protecting the public against deleterious foods. (*Ruban v. City of Chicago* (1928), 330 Ill. 97.) As the city is empowered to regulate, and license for the purpose of regulation, all handlers of foodstuffs, and as the municipal legislative body is the judge of the necessity of expediency of regulation, such a contention would be untenable. (*Chicago Cosmetic Co. v. City of Chicago* (1940), 374 Ill. 384, 392.)

As further supporting the conclusion reached in this opinion your attention is invited to an opinion given the Superintendent of the Department of License March 14, 1932, Opinions of the Corporation Counsel, Volume XVIII, page 522, wherein we expressed the view that persons conducting establishments wherein nuts are shelled, packed in containers, and then returned to the wholesaler for the purpose of sale, and also establishments wherein teas are placed in bags, and wherein coffees are packed for wholesalers, are subject to license and regulation under the city's Wholesale Food Establishments ordinance. In the opinion we said:

"To construe the section in the manner suggested by the opposing attorney, and hold that the municipal legislative body intended that only those establishments selling or offering or keeping for sale at wholesale any article of food or drink are subject to the ordinance, would be to read out of the enactment the word 'preparation' and to violate one of the cardinal rules of construction, which is that effect should be given, if possible, to all terms employed in the law. It is believed that the council clearly intended to include within the ordinance not merely those establishments where food or drink was sold or offered or kept for sale, but also those places where any article of food or drink used or intended for human consumption was prepared, manufactured, canned, bottled or packed.

The ordinance in question is a health measure designed to assure sanitary conditions in buildings or rooms in which the business of preparing articles of food or drink is carried on. Insanitary conditions injurious to the public may exist and in fact might more easily exist in those establishments where articles of food were merely prepared and not offered for sale."

Our opinion therefore is that the potato washing company referred to in your communication is subject to regulation and license under the city's Wholesale Food Establishments ordinance.

MASTER PLUMBERS

(No. 10961—Board of Examiners of Plumbers—F. T. M.—April 25, 1947.)

It is not within the power of the Board of Examiners of Plumbers to waive the requirement that an applicant for a license as a Master Plumber must first be qualified as a Journeyman Plumber.

Citation: Municipal Code, 162-3.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of April 19, 1947, requesting an opinion as to whether or not a master plumber's license may be issued to an applicant who does not hold a journeyman plumber's license. Your letter states that a plumbing contractor licensed and doing business in Hammond, Indiana has made request of your office for application for a master plumber's license to operate and conduct a plumbing business in the City of Chicago and State of Illinois and that you have been informed that under the City laws of Hammond, Indiana, it is not necessary that an applicant have a journeyman plumber's license before receiving the Master certificate.

Section 162-3 of the Municipal Code sets forth the necessary qualifications of an applicant for a master plumber's license, and is as follows:

"* * * (c) The application is accompanied with affidavits of the applicant's employer or former employer or other satisfactory evidence showing the applicant has been actually engaged as a licensed journeyman plumber for at least four years, or that such applicant has been graduated from a recognized college or university in a course of plumbing, sanitary engineering, mechanical engineering, civil engineering, or architectural engineering, and has also been employed by a licensed master plumber for at least two years as a licensed journeyman plumber, or that the applicant has been a student in a recognized college or university and has pursued a course in plumbing, sanitary engineering, mechanical engineering, civil engineering or architectural engineering for at least three years and has thereafter been employed as a licensed journeyman plumber by a master plumber for at least three years;" * * *

The foregoing section provides that no application for a certificate of license of a master plumber be filed by your board, nor shall any applicant

be permitted to take an examination for Master plumber unless previously engaged or employed as a licensed journeyman plumber. The only variations as to requirements relate to the number of years engaged in study at a recognized college and actual years of experience as a journeyman plumber.

It is our opinion that it is not within the power of your board to waive the requirement that an applicant for a license as a Master plumber must first be qualified as a journeyman plumber. The holding of a plumbing contractor's license issued by the City of Hammond, Indiana, does not exempt the applicant from the requirements as prescribed in the ordinance.

HORSE SELLER'S LICENSE

(No. 10968—Deputy City Collector—M. H. F.—June 5, 1947.)

Persons engaged in the business of selling horses at public auction within the City are subject to license under the existing Auctioneer's license ordinance.

Citation: Municipal Code, 106-1, 106-2.

OPINION OF FOREGOING SYNOPSIS

Your communication of May 28, 1947 requests our opinion as to whether persons engaged in the business of selling horses at public auction are subject to license under the city's Auctioneers license ordinance, Chapter 106 of the Municipal Code of Chicago.

Section 106-1 of this ordinance defines auctioneer to mean "any person who sells real or personal property at public or private auction for another or for himself."

Section 106-2, the license required section, provides that no person shall sell or attempt to sell at public or private auction in this city any real or personal property of any kind whatsoever (except under and by virtue of legal process or under and by virtue of a mortgage) without first having obtained a license therefor.

Obviously horses are personal property, and being personal property the selling of them at public or private auction would in our opinion subject the person selling to license under the above mentioned ordinance.

In connection with your request for opinion you invite our attention to and opinion given the Superintendent of the Bureau of License, December 29, 1932, in which the conclusion was reached that a horse dealer at the Union Stock Yards who operated a horse barn and sales stable and was licensed under the city's Livery Stables license ordinance, was not subject to license under the Auctioneers license ordinance when he sold horses at public or private auction. This opinion, however, was based upon the Auctioneers license ordinance, Chapter 65, Revised Chicago Code of 1931, which was in force and effect at that time, and the definition section which read as follows:

"An auctioneer is one who sells *goods* at public auction for another or for himself. Any person who sells his own *goods* at a

public auction or private auction is an auctioneer within the meaning of this chapter." (*Italics ours.*)

Inasmuch as the Municipal Code has since been amended and the definition of auctioneer enlarged to include all persons who sell at public or private auction in the city any personal property of any kind whatsoever (except under legal process or by virtue of a mortgage), the opinion above mentioned is no longer controlling upon the question and we are now constrained to express the view that persons who are engaged in the business of selling horses at public auction within the city are subject to license under the existing Auctioneers' license ordinance.

TAXICAB ORDINANCE

(No. 10975—S. R. D.—June 23, 1947.)

A taxicab driver who refuses to take a passenger to his destination within the limits of the City is violating the provisions of the Municipal Code, subjecting him to a penalty or revocation of his license.

Citation: Municipal Code, 28-20, 28-45, 28-50.

OPINION OF FOREGOING SYNOPSIS

We acknowledge receipt of your letter of June 14, 1947, to which is attached a letter you addressed to the Law Department of the Chicago Tribune in which you stated that a cab driver refused to take you to your destination; whereupon you demanded him to drive you to the Desplaines Police Station where the desk sergeant stated he could find no ordinance which had been violated and suggested that you charge the cab driver with disorderly conduct.

You request that we furnish you with provisions of the Municipal Code of Chicago which cover such a situation.

Section 28-20 of the Municipal Code of Chicago provides as follows:

"28-20. It shall be the duty of the driver of a taxicab to accept for transportation from and to any place within the city one person or any number of not more than five persons who apply for transportation as a group; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted for transportation if the taxicab has seating accommodations for them. No passenger shall be permitted to ride on the front seat with the driver of the taxicab."

There are two sections of the ordinance which provide for a redress for a violation of the above-quoted section of the ordinance.

Section 28-45 of the Municipal Code of Chicago provides as follows:

"28-45. Any driver's license may be suspended by the commissioner for a period not to exceed thirty days or revoked at any time by the mayor, upon the recommendation of the commissioner, for the violation of any state law or city ordinance. Such suspension shall be

noted on the license, together with a statement of the reasons therefor. The driver shall be deprived of his badge upon the suspension or revocation of his license. In case of suspension, the badge shall be returned at the expiration of the suspension period. The commissioner shall notify the department of police whenever a driver's license is suspended or revoked."

Section 28-50 of the Municipal Code of Chicago provides:

"28-50. Any person violating any of the provisions of this chapter shall be subject to a penalty of not less than five dollars nor more than one hundred dollars for each offense, and each day that such violation shall continue shall be deemed a separate and distinct offense."

It is our opinion that if a driver of a taxicab would violate Section 28-20 of the Municipal Code of Chicago his license would be subject to suspension or revocation as provided for in Section 28-45 or in addition thereto the driver of a taxicab would be subject to a penalty of not less than \$5.00 nor more than \$100.00 as provided for in Section 28-50 of the Municipal Code of Chicago.

ITINERANT PHOTOGRAPHER

(No. 10990—Commissioner of Police—F. V. M.—August 20, 1947.)

Itinerant photographers are in violation of the Municipal Code when operating without a photographer's license.

Citation: Municipal Code, 36-49, 160-3, 161-1, 161-2.

OPINION OF FOREGOING SYNOPSIS

We have your letter of August 8, 1947 with attached copy of report from the Commanding Officer of the First District referring to the arrests of itinerant photographers, in which you ask for an opinion as to the application of the Municipal Code to these itinerant photographers, their arrest, etc.

We do not believe that the photographers involved in the arrests referred to were violating Section 160-3 of the Municipal Code, but were operating in violation of Section 36-49 thereof in that they were soliciting pedestrians to buy photographs.

An itinerant photographer is recognized by the definition in the Municipal Code of Chicago, Section 161-1 and Section 161-2 thereof, reading as follows:

"161-1. The word 'photographer' is hereby defined to mean any person operating, managing, or maintaining a photographic studio, a postcard studio, tin-type or ferrotype studio, a bromide enlarging plant, an amateur finishing or developing plant, or a portrait-copying house, or engaging in the business of photography, including commercial, portrait, and home portrait photography, or the business of a lantern slide maker, or of an itinerant or transient photographer, or the business of photography for any purpose whatsoever.

161-2. No person shall engage in the business of a photographer without first having obtained a license therefor; provided, however, that the provisions of this chapter shall not apply to photographing for or developing of motion picture films."

It would, therefore, be a further violation of the Municipal Code for itinerant photographers to operate without a photographer's license.

WHOLESALE FLORIST'S LICENSE

(No. 10991—Chairman, Finance Committee—M. H. F.—August 25, 1947.)

The City of Chicago has the authority to license wholesale florists.

Citations:

Statute: IRS '45, Ch. 5, Sec. 91.

Ch. 24, Sec. 23-91.

Ordinance: Municipal Code, Ch. 128.

Cases: 186 Ill. 336.

239 Ill. 237.

180 Ill. App. 641.

235 Ill. App. 560.

Other reference: Coun. J. p. 3008 (Aug. 21, 1940).

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date requests our opinion as to whether Section 23-91 of the Revised Cities and Villages Act is broad enough to authorize the City to license wholesale florists.

Section 23-91 reads as follows:

"To license, tax, and regulate auctioneers, private detectives, money changers, bankers, brokers, barbers, and the keepers or owners of lumber yards, lumber storehouses, livery stables, public scales, ice cream parlors, coffee houses, *florists*, detective agencies, and barber shops." (Italics ours.)

As the word "florists" is used in its general and unlimited sense and the section is an express grant of power to license, tax, and regulate florists, our opinion is that in and by the section the City has been delegated authority to license wholesale florists as well as retail florists.

On August 21, 1940 (Coun. J. p. 3008) an ordinance regulating, but not licensing, wholesale florists was repealed.

In November 1941, at the request of the Chairman of the Committee on License we prepared and transmitted a form of ordinance licensing and regulating both wholesale and retail florists. When the existing ordinance licensing and regulating retail florists (Chap. 128, Municipal Code of Chicago) was enacted in the year 1943, for some reason not now recollected by us, wholesalers were not included within its terms.

There has been in the Illinois statutes for many years an Act known as the Farmers' Protection Act, entitled "An Act for the protection of

farmers, fruit-growers, vine growers and gardeners." Approved Jan. 13, 1872. This act may be found in Section 91, Chapter 5, Illinois Revised Statutes. It reads as follows:

"Every farmer, fruit and vine grower, and gardener, shall have an undisputed right to sell the produce of his farm, orchard, vineyard and garden in any place or market where such articles are usually sold, and in any quantity he may think proper, without paying any state, county or city tax, or license, for doing so, any law, city or town ordinance to the contrary notwithstanding: Provided, that the corporate authorities of any such city, town or village may prohibit the obstruction of its streets, alleys and public places for any such purpose: And, provided further, that nothing in this Act shall be so construed as to authorize the sale of spirituous, vinous or malt liquors, contrary to laws which now are or hereafter may be in force prohibiting the sale thereof."

Our surmise is that because of the existence of this act the City has not subjected wholesale florists to license. However, we are unable to find any court authority construing the act to include flower gardeners, or any case in which the constitutionality of the act was questioned. It may be that if attacked on the ground of unlawful discrimination its constitutionality would not be sustained.

In *Hewitt v. People* (1900), 186 Ill. 336, the court held that the protection intended by the act was limited to farmers, fruit growers, vine growers, and gardeners selling their products as farmers, fruit growers, vine growers and gardeners, and it was not intended to protect retail merchants, grocers, or keepers of drinking establishments in the sale of products which the ordinary vender must have a license to sell. The case involved the sale of hard cider.

In *Holzman v. City of Canton* (1913), 180 Ill. App. 641, the act was cited in aid of an ordinance licensing hawkers and peddlers which excepted farmers and gardeners bringing produce into the city and selling the same.

In *City of Quincy v. Burgdorf* (1924), 235 Ill. App. 560, the court held that a city has power to regulate the sale of milk and its products under the powers conferred by the Cities and Villages Act, notwithstanding the Farmers' Protection Act above referred to.

While a liberal construction of the Farmers' Protection Act might be given which would interpret the word "gardener" to include flower gardener and the words "produce of his * * * garden" to include flowers or products of a flower garden, we doubt that it was the intention of the legislature at the time it passed the act in 1872 to give protection to or confer extraordinary privileges upon growers of flowers, or to others than those marketing hay and grains and fruit and vegetable growers.

Even if the courts were to uphold the constitutionality of the act and also decide that flower gardeners were immune from municipal taxes and licenses, and therefore not subject to the terms of the City's Wholesale Florists' ordinance, still it would seem that the ordinance would subject to license those wholesale dealers in flowers who were not growers of flowers.

Furthermore, the act under consideration does not purport to confer an unlimited or unrestricted right to market produce of farms, orchards, vineyards and gardens. It restricts that right to "any place or market where such articles are usually sold".

And, there is an additional point which might be used to sustain a wholesale florists' ordinance, which is this: Section 23-91 of the Revised Cities and Villages Act passed in 1940, is a later enactment than the Farm-

ers' Protection Act passed in 1872. While repeals by implication are not favored, the rule is that if two inconsistent statutes deal with the same subject-matter, so that both cannot be operative, the later act will be regarded as a substitute for the former one and operate as a repeal thereof, though containing no express repealing clause. *Ayres v. City of Chicago* (1909), 239 Ill. 237.

Our conclusion, therefore, is that the City of Chicago is authorized to license wholesale florists.

FOREIGN CORPORATION ORDER OFFICE

(No. 11019—City Collector—M. H. F.—January 27, 1948.)

A Michigan coal corporation maintaining an order office only in Chicago does not come within the provisions of the City ordinance licensing coal dealers.

Citations:

Statute: IRS '47, Ch. 24, 23-75, 23-92.
Ordinance: Municipal Code 113, 172-1, 172-2—172-10.
Case: 255 Ill. App. 350.

OPINION OF FOREGOING SYNOPSIS

Your communication of January 22, 1948 transmits a letter from a coal corporation in which that company contends that it is not subject to license under the city's ordinance licensing and regulating the business of coal yard owner or dealer in solid fuel, sections 172-2 to 172-10 inclusive, Municipal Code of Chicago. You request our opinion relative to the matter.

The company's letter states that it is not required to be licensed for the following reasons:

(1) That it is an out of state corporation with principal office in Detroit, Michigan, where all sales are confirmed. That salaried employees of the company solicit orders for coal in Chicago to be sent to Detroit for acceptance.

(2) That the company is exclusive sales agent for a Virginia and Kentucky coal producer on a long term contract.

(3) That sales in Chicago are made in car lots only to retail dealers and industries.

(4) All sales are made f.o.b. mines in Virginia and Kentucky and delivery of the coal is taken by the customer at the mine. The customer pays the freight to Chicago and directs the routing to his yard or plant.

(5) The company has no vehicles or other facilities for making any deliveries in Chicago, nor does it contract with others in any manner for such service, and it carries no stock of coal on hand either in cars or at any location in the City of Chicago.

The company also states that it is a member of the Chicago Wholesale Coal Shippers Association against whose members certain prosecutions for failure to procure licenses as dealers in solid fuel, then pending before

municipal Judge Cecil Smith, were nonsuited December 23, 1947 by this office.

Section 172-1 of the Municipal Code defines the term "dealer in solid fuel" to mean any person not a coal yard owner, as defined in the section, offering for sale, selling, delivering, or selling and delivering any solid fuel, and also any person who peddles any solid fuel.

Section 172-2 provides that it shall be unlawful for any person to engage in the business of coal yard owner or dealer in solid fuel, within the fire limits of the city, without first having obtained a license therefor.

The fee section, section 172-4, provides that the annual license fee for each dealer in solid fuel shall be twenty dollars for each separate place of business operated or conducted by the licensee within the city, provided not more than one vehicle is used in connection with the business, plus fifteen dollars additional annually for each additional vehicle, if any, used by the licensee in connection with said business.

As we view the ordinance it is one enacted pursuant to the city's grants of power to regulate and prevent the storage of combustibles, and to regulate and prohibit the keeping of any coal yard, or the placing, piling, or selling of coal, or other combustible material within the fire limits of the municipality. (Sections 23-75 and 23-92, Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes.) Its manifest purpose is to protect life and property against the hazards of fire and explosion. Though the ordinance definition of dealer in solid fuel is broad, when the ordinance is read as a whole it appears to be one designed to regulate and license those operating coal yards and those storing or handling solid fuel within the fire limits of the city. We doubt that the courts would uphold a construction of the ordinance which would subject to license those persons who do not handle or store any solid fuel within the city but who merely maintain branch offices here and solicit orders for coal to be shipped from mines in another state in the manner as set forth in the coal corporation's letter.

Basing our conclusion upon the facts now given us our opinion is that the Norfolk and Chesapeake Coal Corporation is not subject to license under the above mentioned ordinance.

Whether the company would be subject to a general brokers license pursuant to chapter 113 of the Municipal Code or exempt from such license as a manufacturer's agent (*City of Chicago v. Dollarhide* (1930), 255 Ill. App. 350) would depend on whether it did a general brokerage business in coal or acted merely as a manufacturer's agent for one or more mines or producers of coal. From what it states in its letter the indication is that it is acting as a manufacturer's agent and under the decision in the Dollarhide case would be exempt from license under the city's Broker's ordinance.

INSURANCE BROKERS

(No. 11020—City Collector—M. H. F.—January 29, 1948.)

The Municipal Ordinance regulating and licensing insurance brokers is a valid exercise of the City's power.

Citations:

Statute: IRS '47, Ch. 24, 23-91.
Ordinance: Municipal Code, 113-9 to 113-14.
Case: 364 Ill. 13.

OPINION OF FOREGOING SYNOPSIS

Your communication of January 22, 1948 requests our opinion as to whether or not the city's ordinance contained in sections 113-9 to 113-14 inclusive of the Municipal Code of Chicago, regulating and licensing insurance brokers, is valid.

Our opinion is that this ordinance is valid and enforceable against all those subject to its terms.

The document enclosed with your communication appears to be a copy of a work sheet prepared by the writer in connection with his consideration of an injunction suit filed in the year 1933 against the city in which Judge Williams of the Superior Court entered a decree restraining the city and its officials from enforcing against the plaintiffs the provisions of sections 3329 to 3333 of the Revised Chicago Code of 1931, regulating and licensing insurance brokers. Subsequent to the preparation of the memorandum a more extensive investigation was made of the case and the conclusion reached that the decree in the case could not be successfully used to defeat the city in its efforts to enforce the present day insurance brokers license ordinance. While Judge Williams held that sections 3329 to 3333 of the Revised Chicago Code of 1931 were invalid because of the subsequent act of the legislature approved July 8, 1931, entitled "An Act providing for the qualification and license of Insurance Brokers and Solicitors; to prohibit payment of brokerage to any unlicensed person and providing penalties for violation," paragraphs 585 to 603, inclusive, chapter 79, Cahill's Illinois Revised Statutes of 1931, it developed that the State Act of 1931, as amended, upon which the judge relied, was declared unconstitutional by the Supreme Court of Illinois in *Chicagoland Agencies v. Palmer* (1936), 364 Ill. 13, and that at the First Special Session (Laws of 1935-36, First Special Session, page 75) a new state act was passed, which repealed the Act of 1931, as amended. The new act contains a provision expressly reserving the power of cities and villages to tax, license and regulate insurance brokers. Furthermore when the Cities and Villages Act was revised in the year 1941 the legislature reenacted the provision, formerly contained in section 91 of Article V of the Cities and Villages Act and now embraced within section 23-91 of the Revised Cities and Villages Act, to license, tax, and regulate brokers.

In view of the above it seems fair to assume that notwithstanding Judge Williams' decree, if the insurance brokers in whose favor the decree was entered should resort to contempt proceedings, the city might successfully defend on the ground that the injunction no longer had efficacy due to the decision of the Supreme Court in the *Chicagoland Agencies* case, the enactment of the State Insurance Brokers Act of 1936, and the passage of the Revised Cities and Villages Act in 1941.

HARDWARE LICENSE

(No. 11037—City Collector—M. H. F.—March 1, 1948.)

A chain-grocery store must obtain a City of Chicago Hardware Store license to give away aluminum ware as a premium with regular store purchases.

Citation: Municipal Code, 130-10 to 130-14, 135-6 to 135-0.

OPINION OF FOREGOING SYNOPSIS

Your communication of February 17, 1948 sets forth correspondence between you and the National Tea Company concerning the question whether a Chicago store of the National Tea Company located at 3624 Belmont Avenue, is subject to license under the city's Hardware Stores license ordinance, sections 135-6 to 135-10 inclusive, of the Municipal Code of Chicago, when the store handles certain aluminum ware articles which it gives as premiums upon purchases of articles of food purveyed in the store. It is said that the store is licensed under the Retail Food Purveyors ordinance, sections 130-10 to 130-14 inclusive, of the Municipal Code, and that the company claims that it is exempt from license as a retail hardware store by reason of a proviso contained in section 135-6, the definition section of the Retail Hardware Stores ordinance. Our opinion regarding the question presented by the correspondence is requested.

Section 135-6 reads as follows:

"135-6. Definition.) The term 'retail hardware store' is hereby defined to mean any building, room, enclosure, premises, place, establishment, or part of an establishment in the city, operated, maintained, or conducted for the sale or offering for sale at retail of any of the following articles: hardware; tinware; aluminumware; enamelware; cutlery; tools; implements; apparatus; machinery; plumbing; engineers', janitors', blacksmiths', contractors', or electrical supplies; gas, plumbing, or electrical fixtures; other articles or wares made largely of metals; kerosene; rifles, shotguns, and loaded shot shells or cartridges where not more than 25,000 are kept on hand at one time; provided, however, that dealers or establishments or parts of establishments of a similar nature specifically defined and licensed by other parts of this code shall be exempt from the provisions licensing retail hardware stores."

It will be noted that aluminum ware is specifically mentioned. The keeping of aluminum ware for distribution with other articles offered for sale is in our opinion effectually the keeping and offering for sale of such ware. This being so the store comes within the terms of the ordinance.

The proviso contained in the above quoted section obviously is intended to exempt from license dealers in the articles specifically mentioned in section 135-6 who are licensed under other provisions of the Municipal Code, which articles are of a similar nature to those mentioned in section 135-6 and which are specifically defined in other parts of the code.

We do not regard a grocery store or retail food purveying establishment to be of a similar nature to a retail hardware store or find that the articles specifically mentioned in section 135-6 are specifically defined in the Retail Food Purveyor's ordinance, hence we are of opinion that the contention that the store is exempt by virtue of the proviso is not sound.

As the company effectually offers hardware for sale and is not exempted by the proviso our opinion is that the company's business comes within the purview of the Hardware Stores Ordinance and is subject to license under it.

PHOTOGRAPHERS' SUPPLIES

(No. 11040—Chairman, Subcommittee Finance—M. H. F.—March 3, 1948.)

The City of Chicago does not have the authority to license manufacturers and dealers in photographic supplies.

Citations:

Statute: IRS '47, Ch. 24.
Ordinance: Municipal Code, 129-56 to 129-65, 155-1 to 155-44, 161.
Cases: 368 Ill. 282.
369 Ill. 65.
374 Ill. 384.
379 Ill. 504.
381 Ill. 347.

OPINION OF FOREGOING SYNOPSIS

You have requested by your letter of February 20, 1948 our opinion as to the power of the city council to license and regulate the manufacture and sale of photographic supplies.

We have examined the Cities and Villages Act, chapter 24, Illinois Revised Statutes, and find that it contains no express grant of power to the corporate authorities of municipalities to license and regulate the manufacture and sale of photographic supplies, or to license and regulate manufacturers of or dealers in such supplies.

The express enumeration of occupations or businesses over which a city is given control, excludes all others, but power to legislate on a given subject may be derived from several items of enumeration, or implied as necessarily incident to powers expressly granted. *City of Bloomington v. Wirrick* (1942), 381 Ill. 347; *City of Chicago v. R. & X. Restaurant* (1938), 369 Ill. 65; *Chicago Cosmetic Co. v. City of Chicago* (1940), 374 Ill. 384. The power to regulate includes the power to license. *City of Chicago v. Ben Alpert, Inc.* (1938), 368 Ill. 282. Generally, a municipality's police power is broad, but to sustain an ordinance as an exercise of the police power it must tend in some degree, within the authority of the municipality, toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. *Merrill v. City of Wheaton* (1942), 379 Ill. 504.

From our examination of all sources of power, express and implied, we are forced to the conclusion that the city council does not have authority to license manufacturers and dealers in photographic supplies as such. Therefore, unless there is used in the process of manufacture and found among the articles handled by dealers flammable or combustible materials or materials constituting health hazards a license ordinance could not be supported. The city has no power to license solely for the purpose of revenue or to license except as a means of regulation. Our conferences with the Fire Marshal in charge of the Bureau of Fire Prevention disclose that the bureau has investigated establishments of dealers in photographic supplies and found no materials being dealt in which in his opinion present extraordinary fire and explosion hazards.

It would seem that safety regulations contained in existing ordinances might be found to be reasonably adequate without the enactment of further legislation.

Your committee is familiar with the ordinance (sections 155-30 to 155-44, Municipal Code of Chicago) which relates to the storage of motion picture films and requires manufacturers and dealers in more than 2000 feet of such films to be licensed. You have recommended that this ordinance be amended so as to exempt stores of non-flammable or safety films, and the city council has passed your amendment. Of course any manufacturer or dealer in nitrocellulose films who stores more than 2000 feet of such films would be subject to regulation and license under this ordinance.

Your attention is invited to the following provisions of the Municipal Code which have a relationship to the matter under consideration:

Sections 129-56 to 129-65 inclusive, which provide for the regulation and licensing of persons manufacturing, storing or keeping of any nitrocellulose products, in excess of 25 pounds.

Sections 155-1 to 155-29, which regulate the exhibition of motion pictures, license and regulate operators of motion picture projecting machines, license and regulate printers and developers of motion picture films and titles.

Chapter 161, which licenses and regulates photographers.

COAL WEIGHT CERTIFICATES

(No. 11041—City Sealer—M. H. F.—March 9, 1948.)

Where a private club located in Chicago purchases coal by the ton outside the City, where title passes outside the City, and the coal is hauled by truckers engaged by the club, such transactions do not come within the provisions of the Municipal Ordinance requiring weighmaster's certificates.

Citations:

Ordinances: Municipal Code. 100-1, 100-8, 100-19, 100-28.

Cases: 299 U.S. 387.

312 Ill. 520, 522.

363 Ill. 125.

OPINION OF FOREGOING SYNOPSIS

Your communication of March 8, 1948 requests our opinion concerning the authority of your department to arrest out-of-town truckers who are delivering coal in load lots to a private club in Chicago, for violating section 100-19 of the Municipal Code of Chicago. You state that a representative of the club has stated to you that the club is buying the coal from a coal merchant in Indiana and that the club has engaged its own truckers to haul the coal from Indiana to the clubhouse in Chicago. You further tell us that five arrests have been made and that you have been informed that other deliveries of coal will be made in the immediate future. Specifically you wish to be advised whether you have the right, if the above related circumstances are true, to arrest these truckers because they are hauling coal without a Public Weighmaster's certificate.

Section 100-19 is contained in chapter 100 of the Municipal Code entitled "Regulation of weights and measures." The section reads in part as follows:

"100-19. Weighing load lots.) Every load of solid fuel of more than one thousand pounds, or of any other commodity, produce, or other article of merchandise sold in load lots by weight, delivered by vehicle within the city, shall be weighed by a public weighmaster. A certificate of weight for each such load, issued by such public weighmaster, shall be delivered by the driver or person in charge of the vehicle to the purchaser or consignee of such load, or to his or their agent, at the time of the delivery and before any of the commodity, produce, or article of merchandise is removed from the vehicle, or such certificates shall be delivered to the inspector of weights and measures, or any of his deputies upon his or their demand."

Section 100-1 covers the matter of inspection of weighing instruments used "in weighing or measuring any article intended to be purchased or sold in the city."

Section 100-8 provides as follows:

"100-8. Weighing of solid fuel.) Every person selling or offering for sale solid fuel in the city shall sell the same by avoirdupois net weight."

Section 100-28 entitled "False certificates and delivery tickets," provides in part as follows:

"No person shall sell and deliver, or attempt to deliver, any load lot of any commodity sold in load lot by weight and delivered by vehicle within the city, of a quantity less than that called for by the certificate of weight; * * *".

It will be seen that the ordinance provisions contained in chapter 100 were enacted for and designed to protect from dishonest weights Chicago inhabitants, consumers of coal and other commodities, when sold and delivered within the city in load lots. The purpose of the ordinance was explained by the Supreme Court of Illinois in the case of *City of Chicago v. Wisconsin Lime and Cement Co.* (1924), 312 Ill. 520, 522, wherein the court said:

"Purchasers of a commodity by weight already had that protection but no way to enforce it. In buying ordinary articles the buyer generally may see the article weighed or have the means at hand to ascertain whether it is short weight, but when applied to load lots it was and is impossible for the purchaser to determine the weight of the load. The purpose of the ordinance was most commendable and essential to secure to the purchaser the weight of the commodity purchased and paid for."

The ordinance was further reviewed and upheld by the Supreme Court of Illinois in the case of *City of Chicago v. Waters*, 363 Ill. 125, and by the Supreme Court of the United States in *Hauge v. City of Chicago*, 299 U. S. 387.

The sales made to Chicago users which were involved in the above mentioned litigated cases were made in the City of Chicago and the title to the coal sold to consumers passed within the city.

Manifestly the city's power to regulate the sale and delivery of coal and other commodities sold in load lots is not extraterritorial, but confined to the city's territorial jurisdictional limits.

If the facts in the instant situation are that coal is being sold and delivered to the club in load lots within the city, whether by resident coal dealers or dealers in other places or states, then the ordinance provisions would apply and none of the coal could lawfully be delivered to the club without Chicago Public Weighmaster certificates of weight.

If, however, the club buys coal by the ton in Indiana, or some place outside of Chicago, where it takes title to and possession of the coal, and then by truckers engaged by the club the coal is hauled from Indiana to the clubhouse in Chicago, our opinion is that the ordinance would not apply.

When, however, the inspectors of your department come upon truckers making deliveries of coal in load lots to Chicago users, or the club in this case, which coal is being delivered without certificates of weight issued by Chicago licensed and bonded Public Weightmasters, prima facie cases would be presented and in the absence of proof that the deliveries were not subject to the ordinance, your department would be warranted in giving arrest notifications to the truckers concerned, charging them with violating section 100-19 of the Municipal Code. If on the trial of such cases the club was able to show that it bought and took title to the coal in Indiana and was doing its own trucking from Indiana to its clubhouse in Chicago, our opinion is that the courts would probably find that such transactions were not within the purview of the ordinance provisions and discharge the defendants.

PLUMBER'S LICENSE

(No. 11043—Board of Examiners of Plumbers—J. F. G.—March 18, 1948.)

Under existing state law and city ordinance the licensing of journeymen plumbers is not limited to citizens of the United States and the City Ordinance should be amended to eliminate the citizenship qualification for a master plumber's license.

Citations:

Statute:	IRS '47, Ch. 27, 22-49. Ch. 111½.	
Ordinance:	Municipal Code, 162-3, 162-4, 162-5.	
Cases:	94 U.S. 391, 396.	180 U.S. 333, 341, 342.
	100 U.S. 483.	232 U.S. 138, 145, 146.
	111 U.S. 746, 762.	236 U.S. 1, 14.
	113 U.S. 27, 31.	239 U.S. 33.
	118 U.S. 356.	274 U.S. 392.
	149 U.S. 698, 713.	297 Fed. 340.
	163 U.S. 228, 242.	47 Atl. 165 (Me.).
	165 U.S. 578, 589, 590.	73 Md. 250.
	169 U.S. 649, 695.	81 N.E. 149 (Mass.).
		131 Mich. 250.

OPINION OF FOREGOING SYNOPSIS

In your letter transmitting the inquiry for our consideration, our attention was directed to section 162-3 (b) of the Municipal Code of Chicago relating to a master plumber's license wherein it is expressly provided that the applicant must be a citizen of the United States. You

have asked for our opinion if a journeyman certificate may be issued to a person who is not a citizen.

The qualifications of an applicant for a certificate of license of journeyman plumber are stated in section 162-4 of the code. The only qualification there mentioned is that the applicant has been occupied as a plumber's apprentice for at least five years or, in the alternative, has pursued a course in plumbing, sanitary engineering, mechanical engineering, civil engineering or architectural engineering for at least three years in a recognized college or university, and has also served one year as a registered plumber's apprentice. This section is silent on the subject of citizenship. The palpable omission from section 162-4 of any citizenship qualification similar to that contained in section 162-3 seems to be consistent with the qualifications for a certificate of registration of a plumber's apprentice, required by section 162-5. The minimum age for an apprentice is sixteen years. An apprentice, may, therefore, become qualified for a journeyman's license before he attains the age of twenty-one years. Unless he were born in the United States, or became a citizen while a minor, by virtue of the naturalization of his parents under the Act of Congress, he would be qualified for a journeyman's license before he could become a citizen. Whether or not this circumstance is sufficient to indicate that the omission of citizenship qualification from section 162-4 was deliberate, is not, however, the decisive point in this case.

The power of the city to license persons to engage in the plumbing trade is derived from section 22-49 of the Revised Cities and Villages Act and the Illinois Plumbing License Law (Ill. Rev. Stat. 1947, chap. 111½, p. 2603). Section III of the State law provides that any master plumber or journeyman plumber holding a license issued by the Department of Registration and Education of the State of Illinois, is permitted to engage in the business of a master plumber or as a journeyman plumber any place in this State, and section IX provides that any person authorized to engage as a master plumber or journeyman plumber in any city having a population of 500,000 or more, by authority of a city ordinance, is authorized to engage as a master plumber or journeyman plumber anywhere in this State.

The provisions in the code relating to the qualifications of applicants for plumbers' licenses are substantially the same as the provisions of the State law relating thereto. One of the qualifications for a master plumber's license under the State law is that the applicant be a citizen of the United States. As to the journeyman plumber's license, the State law, like the code, omits the citizenship qualification.

In our opinion, a provision making citizenship a necessary qualification has no proper place in any law or ordinance governing the licensing of persons to engage in the plumbing trade. It is contrary to the American conception of civil liberties.

The Fourteenth Amendment to the Constitution of the United States prohibits the States from denying to any person within their jurisdiction the equal protection of the law. It is not confined to the protection of citizens (*Yick Wo v. Hopkins* (1885) 118 U. S. 356).

In *Truax v. Raich*, 239 U. S., 33, the court struck down an Arizona law which required every employer of more than five workers in the State to employ not less than eighty per cent qualified electors or native born citizens of the United States. Beginning on page 39, the court, speaking through Mr. Justice Hughes said:

"The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus

admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. (See *Gegiw v. Uhl, Commissioner*, decided October 25, 1915, *ante*, p. 3.) Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo v. Hopkins*, 118 U. S., 356, 369 (referring to the due process and equal protection clauses of the Amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' See also *Wong Wing v. United States*, 163 U. S. 228, 242; *United States v. Wong Kim Ark*, 169 U. S. 649, 695. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. Thus in *McCready v. Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham*, 100 U. S. 483; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. * * *

"It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 21; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting*

v. *United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."

Occupations which are injurious to the community or likely to become so may be regulated or prohibited. Consequently, the States may discriminate against aliens in licensing persons to engage in such business. It has been held that a State may deny to aliens licenses to sell spirituous liquor (*Tragesser v. Gray*, 73 Md. 250, 9 L.R.A. 780) or to engage in the business of owning or operating a billiard or pool room (*Anton v. Van Winkle*, 297 F. 340; *Ohio v. Deckebach*, 274 U. S. 392, 71 L. ed. 1115).

In Massachusetts a statute which provided that no one can obtain a peddlers license unless he is, or has declared his intention to become, a citizen of the United States, was sustained (*Commonwealth v. Hana* (Mass.) 81 N. E. 149), but in the State of Maine a statute which forbade peddling except under license, and denied a license to an alien, was held to violate the equal production clause of the Fourteenth Amendment (*State v. Montgomery*, 24 Me. 192; 47 Atl. 165).

In *Templar v. Barber's Board of Examiners*, 131 Mich. 250, a barber's license law requiring examination for fitness, but limited to citizens, was held unconstitutional. In this case the distinction was made between callings which may be regulated and those which are privileged or which may be prohibited, as in the case of persons applying for admission to the bar, which is a public office, and persons applying for a license to sell liquor at retail, because this business may be prohibited altogether.

The plumbing trade is a common occupation in which any person may engage for a living, subject only to reasonable regulations for the protection of public health and safety. The occupation cannot be prohibited by law and it is not, therefore, a privilege which may be granted only to citizens of the United States or withheld from aliens who are lawful residents of this nation.

It is our opinion that under the existing State law and city ordinance the licensing of journeyman plumbers is not limited to citizens of the United States and that the city ordinance should be amended to eliminate the citizenship qualification for a master plumber's license. The qualifications of an applicant for a plumber's license under the city code need not be the same as those prescribed by the Illinois Plumbing License Law. Section IX of the State law provides that "this Act, except as otherwise herein provided, shall not apply within any such city, * * * which enacts such ordinance." The exception applies to the provision that a person holding a State license is permitted to engage in business any place in the State "including any city having a population of 500,000 or more inhabitants" (section III), and to the provision that a person holding a city (Chicago) license is authorized to engage in business anywhere in this State.

SPECIAL POLICE

(No. 11054—Commissioner of Police—M. H. F.—May 5, 1948.)

A police watch service whose only service is the checking of doors of business establishments is not required to have a Special Police License.

Citation: Municipal Code, 173-1, 173-2, 173-3.

OPINION OF FOREGOING SYNOPSIS

Your communication of April 26, 1948 quotes a letter received by you from an attorney representing a police watch service, reading in part as follows:

"That service does not engage in the work of special police, but instead maintains a watch service. I am inquiring whether or not that organization or its men, hired as watchmen, are required to have a special police commission, under Ordinance 173-1, 173-2, 173-3. The work of organization consists of the following employment:

The service maintains two automobiles on which the name of the organization is printed. The men, so employed, check the doors of different stores, to see if they are open. In the event a store of one of the customers has been broken into, the men call the nearest police station. They do not have the power of arrest by virtue of their employment, only as private citizens. They do not have specified streets or areas or "beats" to cover. They may have one client on one street one month, and the next month, they may lose that client and have another client on a different street. They watch over several hundred establishments. They do not guard a fixed place or building. They wear uniforms and badges.

I have taken up the matter with the corporation counsel's office, and they referred me to an Opinion given your office on June 10, 1942, Opinion No. 10646, Opinions of the Corporation Counsel Volume 21, page 162. I do not believe we come within the purview of those agencies or persons listed. I have taken the matter up with Captain Corliss, in the Chief of Police's Office, who is of the opinion that a Special Police License is not required of a watch service such as this.

Will you advise me whether or not these men are required to have a Special Police License. I would appreciate a prompt reply." You request our opinion upon the matter.

The following sections of chapter 173 of the Municipal Code of Chicago, entitled Special Policemen, are pertinent to your inquiry:

173-1. Definition.) The term "special policeman" is hereby defined as any person who, for hire or reward, shall guard or protect any building, structure, premises, person, or property within the city; provided, however, that this shall not apply to regularly appointed police officers of the city or to any sheriff or deputy sheriff of the county.

173-3. Appointment.) An application of any person showing the necessity of appointment as a special policeman shall be made to the commissioner of police. The commissioner of police shall have power to appoint and swear in any number of special policemen to do special duty at any fixed place in the city, or at any of the necessary

places for the protection of persons, passengers, and property being transported in interstate or intrastate commerce within the city, at the expense and charge of the applicant.

So far as the inquiry is concerned the agents employed by this particular watch service are not required to be licensed as special policemen under chapter 173 of the Municipal Code because there is no express or implied power in the city to prohibit any person from engaging in the business of furnishing watchmen who are not invested with the powers of conservators of the peace, as are regular and special policemen. While the provisions of chapter 173 are rather ambiguous we believe it is intended only to regulate the appointment of special policemen by the Commissioner of Police, and that the definition of special policemen must be amplified and clarified to apply to those who are engaged in the business of furnishing watchmen and guards with the powers of regular policemen as conservators of the peace.

SCHOOL BUSES

(No. 11063—Vehicle License Commissioner—J. F. G.—July 6, 1948.)

School buses, station wagons and other buses which carry children to schools, parks and other places for hire come under the provisions of the Municipal Code and are subject to license by the Public Vehicle License Commissioner.

Citation: Municipal Code, Ch. 28.

OPINION OF FOREGOING SYNOPSIS

We have examined copy of a letter from the Play Clubs of Chicago, transmitted by you with the request for an opinion covering this specific case.

The letter states that the Play Clubs of Chicago is an organization which operates a fleet of station wagons and a school bus for its members as an incident to the operation of a children's recreational program under the direction of counsellors, supervisors and directors; that the organization selects its membership and does not offer its transportation service to the general public. It is contended that the transportation service of the Play Clubs of Chicago is not that of a public or common carrier; that its station wagons and buses are not public conveyances and, therefore, not public passenger vehicles subject to license; that motor vehicles used merely as an incident in the conduct of a business enterprise where no specific charge is made for the transportation is not engaged in the business of transportation of passengers for hire.

It does not clearly appear from the letter or from any information in your communication that the organization furnishing the transportation facilities is engaged in the conduct of the business of providing facilities for play or recreation of the children. From all that appears in this correspondence it may be that the Play Clubs of Chicago is a voluntary association or partnership for profit to provide transportation only for groups of children under the supervision of independent counsellors, supervisors or

directors each of whom have their own groups of children and are paid by the parents for supervising the children's recreation which include the charges of the Play Clubs of Chicago for the children's transportation from their homes to their respective places of recreation; that the relation between these supervisors and the Play Clubs of Chicago is contractual even though the supervisors and each group of children under the direction of each supervisor are members of the organization. Under these circumstances, the case laws cited by Mr. Cusack in his letter are inapplicable to a determination of the questions submitted.

In any event, the term "public passenger vehicle" is defined to mean any motor vehicle used for the transportation of passengers for hire within the City excepting those operated as a public utility. Persons operating public passenger vehicles as defined in Chapter 28 are not necessarily public or common carriers, nor are their vehicles necessarily public conveyances. As defined in Chapter 28 a "public passenger vehicle" subject to license may be a motor vehicle that is hired by agreement for transportation of passengers, subject to the choice or whim of the owner of the vehicle as to the classes, groups or times when such vehicle shall be furnished for transportation service. A livery vehicle is one class of public passenger vehicles, subject to regulation and license for public safety and to compensate the city for the use of its streets for the transportation of persons for hire or profit. Livery vehicles are not "public conveyances" and their operation is not that of a public or common carrier. Livery vehicle operators may choose their passengers, refuse employment and charge for their services as they please.

DUMPING PERMIT

(No. 11087—Commissioner of Police—A. A. P.—December 3, 1948.)

Dumping dry fill on private property with the consent of the owner of the property may be carried on without any permit providing such dumping does not violate the provisions of the Municipal Code prohibiting the dumping of lime, ashes, coal, dry sand or any other substance that may be scattered by the wind.

Citation: Municipal Code, 99-38, 99-42.1.

OPINION OF FOREGOING SYNOPSIS

We have your communication of recent date attaching request of the Commanding Officer of the 31st District regarding the dumping of dry fill at a brick yard in Chicago.

Under the provisions of Chapter 99-36 of the Municipal Code of Chicago, no permit is necessary for depositing dry fill so long as the consent of the owner of the property has been obtained by the persons doing the dumping.

Chapter 99-38 prohibits the dumping of lime, ashes, coal, dry sand or other substances that may be scattered by the wind. If the dumping of any dry substance is apt to be scattered by the wind to such an extent to become a menace to public health, action may be taken against the persons responsible for such condition.

Chapter 99-42.1 prohibits the throwing, dumping or depositing on any public way, any glass, nails, tacks, sharp metal objects or other article or material that may cause damage to rubber tires or motor vehicles.

It is our opinion that dumping dry fill on private property with the consent of the owner of the property may be carried on without any permit provided such dumping does not violate Sections 99-38 or 99-42.1.

SMALL ANIMALS LICENSE

(No. 11095—City Collector—M. H. F.—December 14, 1948.)

Chain stores and other concerns who incidentally deal in goldfish and occasionally small turtles are not subject to license under the City's ordinance licensing dealers in small animals.

Citation: Municipal Code, 105-1 to 105-5.

OPINION OF FOREGOING SYNOPSIS

Inviting our attention to section 105-1 of the Municipal Code of Chicago, you request our opinion upon the question whether chain stores and other concerns who incidentally deal in gold fish and occasionally small turtles, are subject to license under the city's ordinance licensing Dealers in Small Animals, sections 105-1 to 105-5 inclusive, of the Code.

Section 105-1, the license required section, reads as follows:

"No person shall engage in the business of buying, selling, or dealing in birds, dogs, or other small animals used as household pets or used for domestic purposes, without first obtaining a license."

While gold fish and small turtles are animals within the broad meaning of that word, we doubt that it was the intention of the City Council when enacting the ordinance to subject to license persons who only incidentally deal in gold fish and small turtles. Our opinion is that the doctrine of *ejusdem generis* should be resorted to when construing the section, and the general words "or other small animals used as household pets or used for domestic purposes" interpreted to mean animals of the same general kind and character as "birds" and "dogs". We question whether gold fish and small turtles may reasonably be regarded as "household pets" or animals "used for domestic purposes." It is believed the ordinary meaning of the word "pet" is an animal kept to pet and play with fondly, and that it would verge upon the ridiculous to say that gold fish and small turtles are petted or fondled.

It is therefore our opinion that the concerns you mention, who but incidentally or occasionally deal in gold fish and small turtles, should not be asked to procure licenses under the ordinance.

D. REFUND OF LICENSE FEES

REMITTING ELEVATOR INSPECTION FEES FOR CHARITABLE INSTITUTIONS

(No. 10753—Mayor—M. H. F.—August 26, 1943.)

The Municipal Code of Chicago prescribes elevator inspection and exacts a fee for such inspection. The Code does not relieve charitable institutions from such fees. Remissions of said fees in such cases cannot be made.

Citations:

Mun. Code: 46-7, 11, 15.

OPINION OF FOREGOING SYNOPSIS

Your office has requested our opinion whether fees charged for inspection of elevators may be remitted in those cases where the elevators are installed and operated in buildings used or occupied and owned by charitable, religious or educational institutions.

Section 46-11 of the Municipal Code of Chicago provides that every elevator now in operation or which may hereafter be installed, together with the hoistway and all equipment thereof, shall be inspected under and by the authority of the Commissioner of Buildings at least once every six months. Section 46-15 fixes the amount of the fee for such semiannual inspection. We find no provision of the Municipal Code which authorizes the remission of the fee charged against any charitable, religious or educational institution.

In the matter of inspection of buildings there is found contained in section 46-7 of the Municipal Code express provision under which fees charged against any charitable, religious or educational institution may be remitted, when the building inspected is located in or upon premises used or occupied exclusively and owned by such charitable, religious or educational institution, provided that such institution is not conducted or carried on for private gain or profit, and provided, further, that application for the remission of such fees shall be supported by the affidavit of one or more taxpayers of the city as to such facts. The absence in the elevator inspection ordinance of a provision similar to section 46-7 of the building inspection ordinance is significant.

As the code prescribes elevator inspection and exacts a fee for such inspection, and does not relieve charitable, religious and educational institutions from fee exactions, our opinion is that such inspection fees could not properly be remitted to these institutions unless the code were first amended so as to provide for such remission.

REFUNDING UNUSED LICENSE

(No. 10937—Chairman, Finance Committee—M. H. F.—January 30, 1947.)

A tavern owner whose tavern is located in a precinct that has been voted "dry" is entitled to have the remainder of his unused license refunded to him.

Citation: IRS '45, Ch. 43, Sec. 16 (Ill. Liquor Control Law).

Other Reference:

18 Op. Coun. 484.

19 Op. Corp. Coun. 182.

OPINION OF FOREGOING SYNOPSIS

Your letter of January 27, 1947 transmits council documents in the matter of the claim for refunds of unused portions of two license fees paid for premises located in Chicago, namely fees paid under (1) city retail liquor license No. 4678 for the period November 1, 1946 to April 30, 1947, and (2) additional hours of sale special permit or license No. 282 for the same period.

The claimant seeks the refunds on the ground that the precinct in which his liquor establishment was located was voted "dry" at the election held November 5, 1946.

The report of the superintendent of license made to you January 21, 1947 shows that the claimant paid \$440.00 for license No. 4678 and \$385.00 for license No. 282.

Our opinion is requested as to whether it is proper that the unused portion of the late hours or special privilege license be refunded.

Article IX of the Illinois Liquor Control Act, Chapter 43, Illinois Revised Statutes, 1945, which article covers the matter of local option elections, provides in Section 16 thereof that nothing in the act shall be construed to forbid or prevent the sale of alcoholic liquor for the period of thirty days next after the local option vote shall have been taken, according to the terms of a license theretofore regularly issued. The section further provides that any portion of a license fee which shall have been paid and which shall represent the unexpired period for which said license was issued after the sale at retail of alcoholic liquor shall have been prohibited in the precinct or district in which the premises described in such license is located shall be refunded.

The city's records show that on November 5, 1946 a local option election was held in a group of precincts comprising the 49th, 50th, 51st, 52d and 53d precincts (as the same existed November 8, 1932) of the 6th Ward, and that the proposition to prohibit the sale of alcoholic liquor therein carried. Thereafter, litigation was instituted in the County Court of Cook County to contest the validity of the election. This litigation was terminated December 5, 1946 by an order dismissing the proceedings. At the expiration of the thirty day period provided for in Section 16 of Article IX of the Liquor Control Act, and beginning December 6, 1946, the territory comprised within the group of precincts became prohibited territory and the sale at retail of alcoholic liquor therein became unlawful.

Claimant's premises are located within the area voted "dry", hence on and since December 6, 1946 the sale at retail of alcoholic liquor therein has been unlawful, and the claimant has been prevented from enjoying the privileges conferred upon him by the retailers' license and the late hours license theretofore issued to him for said premises.

Obviously, the claimant has not sought to continue in the liquor dispensing business under his licenses by locating elsewhere in an unrestricted area, for he has surrendered his license certificates and they are contained in the file sent us.

So far as the main license, the city retailers' license, is concerned, we have already expressed the view that the holder of a city retailers' liquor license issued for premises in a precinct which has voted "dry" is entitled to have refunded to him that portion of the fee paid for this license which represents the period from the date of actual cessation of the business to the end of the period for which he was licensed.

Opinions of the Corporation Counsel, Volume XIX, page 182; Volume XVIII, page 484 (2 opinions). In one of these opinions we said that the provision of the statute requiring refunding superseded any inconsistent provision contained in an ordinance prohibiting refunds of license fees except in certain specified cases. It would, therefore, be proper for your committee to authorize the refunding to claimant of the unused portion of the fee paid for this license or the portion which represents the period from the date claimant discontinued his liquor business at 6316 Stony Island Avenue because of the result of the local option election and the operation of the state statute, and the end of the period (April 30, 1947) for which the license was issued.

Respecting the propriety of refunding the unused portion of the fee paid by claimant for the late hours license no precedent so far has been established. However, inasmuch as the late hours license is superimposed upon the basic license and is one conferring the privilege to sell alcoholic liquor during additional hours of sale, which privilege is nullified by the result of the local option election, our opinion is that the claimant is also entitled to the refund of the unused portion of this fee, or that portion which represents the period from the date of his suspension of business as the result of the local option election and the operation of the state statute, and the end of the period for which the license was issued, April 30, 1947.

E. AMUSEMENT ORDINANCE

TAXING UNIVERSITY PROGRAMS

(No. 11018—M. H. F.—January 16, 1948.)

The City's Amusement Tax ordinance applies to activities of the University of Chicago such as motion picture shows, plays and dances if such programs are open to the public. If they are exclusive, being open to students only, then the tax ordinance does not apply.

Citation: Municipal Code, 104, 104.1.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date requests our opinion as to the applicability of chapters 104 and 104.1 of the Municipal Code of Chicago to certain activities and operations of the University of Chicago. These activities and operations are said to comprise six groups, (1) athletic events held in the University's Field House, (2) lectures and entertainments given in Mandel Hall, (3) student dances and social affairs held in Ida Noyes Hall, (4) motion picture shows and theatricals held in the theater of International House, (5) bowling alleys and billiard and pool tables operated at various locations on the University campus, and (6) juke boxes kept at one or more locations on the University campus.

Chapter 104 imposes a license tax equal to three per cent of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in any of the amusements included within the definition section of the chapter, excepting automatic amusement machines, and upon automatic amusement machines an annual license tax of twenty-five dollars upon each such machine used within the city for gain or profit from operation. The word "amusement" is defined to mean "any theatrical, dramatic, musical or spectacular performance, motion picture show, circus, rodeo, animal act, athletic contest, sport or similar exhibition, and includes, without being limited thereto, poultry, animal and flower shows, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basket ball, soft ball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games and the operation of automatic amusement machines and other mechanical devices and apparatus." The term "automatic amusement machine" means "any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token including, without being limited thereto, any such coin controlled instrument or device capable of producing or reproducing any vocal or instrumental sounds."

Chapter 104.1, the Public Places of Amusement ordinance, makes it unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement defined in chapter 104 (other than those excepted in the definition section of the chapter), without first having obtained a license for a public place of amusement. Public Places of Amusement are divided into three classes and the fee section fixes the annual license fee for each class. An applicant for license is

required to execute a written undertaking conditioned that the taxes imposed upon any amusement at the licensed premises will be paid in the manner and at the times provided in chapter 104. Several sections contain regulatory provisions.

Copies of chapters 104 and 104.1 are enclosed herewith for your information.

We also enclose herewith a copy of an opinion rendered by this department December 12, 1947 to the chairman of the city council committee on finance on the subject of the tax imposed by chapter 104.

(1) As to the athletic events held in the University's field house you state that you will conduct only six events in 1948 for which admission charges will be made; that these will be intercollegiate basketball games; that the admission charge to each game will be 83 cents, including Federal tax; that such admission charge is paid only by members of the public and that students, faculty and employees are admitted free. You also state that no charge is made for admission to intramural games, track meets and similar events; that last year your total gross receipts from the operation of the field house were \$1844, and a deficit of \$2646 was incurred in its operation and that a similar operating loss is anticipated for 1948; that in 1948, as in former years, you will permit the Chicago Public Schools without charge to hold their indoor championship at the field house; and will permit other local schools and colleges to use the field house on a similar basis. From the above you argue that the field house is not operated by the University for gain or profit, and that no gain or profit is realized; hence, that the University should not be required to take out a Public Place of Amusement license for the field house or pay the amusement tax on athletic events held therein.

Basing our conclusion upon the facts thus given us, our opinion is that the University is not engaged in conducting athletic contests as a profession or in the operation of the athletic contest business, and that the occasional holding of the athletic contests mentioned in your letter by students of the University and other schools and colleges, to which contests admission fees are charged, would not subject the University to the payment of the tax imposed by chapter 104 or to license for the field house under chapter 104.1.

If, however, the University were to rent the field house for professional athletic contests or to professional promoters of athletic contests, or for intercollegiate or interscholastic games in which your University is not a participant, then our opinion would be that such contests would be subject to the tax and that the University would be required to procure a Public Place of Amusement license for the field house pursuant to chapter 104.1 and to guarantee the payment of the tax to the city.

(2) The lectures and entertainments given in Mandel Hall you inform us are student affairs, not held for gain or profit, but solely in the carrying out of the University's educational purposes. As such our opinion is that those occasional ones to which admission fees are charged would not be subject to the tax imposed by chapter 104.

(3) With reference to the student dances and social affairs held in Ida Noyes Hall you state that these are held exclusively for students and that the public is not admitted. As such, a tax imposed by chapter 104 would not in our opinion be applicable to them.

(4) As to the motion picture shows and theatricals held in the theater of International House our understanding is that admission fees are charged, that the general public is not only admitted but invited, and that by advertisements the public is induced to patronize them. We do not see that these motion picture shows and theatricals, are any different

from motion picture shows and theatricals given throughout the city in theaters and motion picture houses, except that possibly the subjects selected are more closely related to educational or foreign languages. So viewed our opinion is that the tax imposed by chapter 104 would be applicable to these amusements and that the International House theater would require a license as a public place of amusement.

(5) As to the bowling alleys and billiard and pool tables operated by the University, for which playing charges are made, provided these facilities are not available for use by the public, our opinion is that the tax would not apply thereto.

(6) With reference to the operation of automatic amusement machines or juke boxes, if the same are operated for gain or profit our opinion is that such devices would be subject to the annual license tax of \$25.00 per box imposed by section 104-4 of the code.

Where any amusement subject to tax under chapter 104 is held section 104.1-2 of the Public Places of Amusement ordinance requires the owner or person in control of the property to be licensed under Chapter 104.1.

PRIVATE CLUB

(No. 11021—M. H. F.—January 29, 1948.)

The Chicago Athletic Association being a private club incorporated not for profit, and operating bowling alleys and billiard tables for members and guests exclusively, is not subject to the provisions of the City's Amusement Ordinance.

Citation: Municipal Code, 104, 104.1.

OPINION OF FOREGOING SYNOPSIS

The department is in receipt of your letter of January 28, 1948 in which you request our views with reference to the applicability of the city's Amusements and Public Places of Amusement license ordinance to the Chicago Athletic Association. Chapters 104 and 104.1, Municipal Code of Chicago. You state that the Association maintains bowling alleys and billiard tables in its clubhouse for the exclusive use of its members and their guests, and you are interested in knowing whether the Association is subject to license as a public place of amusement when it maintains the alleys and the tables in the manner above stated.

There is enclosed herewith a copy of an opinion given the finance committee of the city council, which opinion explains the nature of the tax imposed by the Amusements ordinance.

Chapter 104, with certain exceptions not material to this opinion, imposes a license tax upon all amusements within the city, of an amount equal to three per cent of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or participate in such amusements. Bowling, billiard and pool games are included within the definition of the word "Amusement."

Chapter 104.1, the Public Places of Amusement ordinance, defines the term public place of amusement and makes it unlawful for the owner or person in control of any property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any amusement subject to the tax imposed by Chapter 104, without first having obtained a license for a public place of amusement.

Basing our conclusion upon the information given us, that the Chicago Athletic Association is a private club, incorporated not for profit, and that the bowling alleys and billiard tables maintained in its clubhouse are used exclusively by the club members and their guests, our opinion is that by maintaining the alleys and tables in the manner stated the club does not become a public place of amusement within the meaning of that term as defined in Chapter 104.1, and that the three per cent tax imposed by Chapter 104 would not be applicable to the charges made by the club to its members for the use of the alleys and tables by such members and their guests.

TRAVEL SHOW LICENSE

(No. 11022—M. H. F.—January 30, 1948.)

When the International Sports, Travel and Boat Show leases the Navy Pier facilities they must obtain a Public Place of Amusement License and guarantee to the city the payment of the tax, notwithstanding that the Navy Pier is City owned property.

Citation: 104.1-9.

OPINION OF FOREGOING SYNOPSIS

Your letter of January 29, 1948 requests our opinion as to whether you are required to procure a Public Place of Amusement license in order to conduct an international sports, travel and boat show and an outboard boating club exhibition on the Navy Pier, when the Navy Pier is owned by and rented from the City of Chicago.

When amusements produced, presented, or conducted by you as a profession and in the operation of an amusement business are subject to tax under the city's Amusements ordinance the Public Places of Amusement ordinance requires the owner or person in control of the property to procure a Public Place of Amusement license and to guarantee to the city the payment of the tax. Copies of the ordinances are enclosed herewith. We also enclose a copy of an opinion given the finance committee which explains the nature of the tax.

When you rent space on the Navy Pier you become for the time being the person in control of the property where the amusement is conducted and in our opinion become subject to license under the Public Places of Amusement ordinance, notwithstanding that the Navy Pier is city owned property.

In this connection we call your attention to Section 104.1-9, relating to term licenses.

FEDERAL-STATE EXCISE TAXES

(No. 11029—City Comptroller—J. F. G.—February 17, 1948.)

The Federal tax is an excise tax upon admission tickets, and is expressly excluded from consideration in determining the amount of gross receipts subject to the City Amusement Tax.

The State tax on gross receipts of athletic exhibitions is not an excise tax, but is a tax upon the producer or person conducting the exhibition and is not excluded when determining the gross receipts subject to the City Amusement Tax.

Citations:

Ordinance: Municipal Code, 104-1.

Case: 384 Ill. 283.

OPINION OF FOREGOING SYNOPSIS

SUBJECT: May 10% State tax on gross receipts from admissions to athletic exhibitions be deducted for purpose of determining amount of gross receipts subject to city amusement tax.

We have your letter of February 13, 1948 requesting our opinion upon the above subject.

Section 104-2 of the Municipal Code of Chicago relating to amusements imposes a license tax "upon all amusements within the city, excepting automatic amusement machines, of an amount equal to 3% of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or participate in such amusements." Athletic exhibitions are amusements within the definition of the ordinance (section 104-1).

The federal tax is an excise tax upon admission tickets. It is not part of the gross receipts of the person conducting the performance or exhibition and that tax is, therefore, expressly excluded from consideration in determining the amount of gross receipts subject to the city amusement tax.

The State tax on gross receipts of athletic exhibitions is not an excise tax or a tax upon the purchasers of admission tickets but is a tax upon the producer or person conducting the exhibition just as the retailers occupation tax is not a sales tax on the consumer (*People's Drug Shop, Inc. v. Moysey*, 384 Ill. 283). If the privilege tax is passed on to the purchaser of an admission ticket it becomes a part of the gross receipts from admission fees and is, therefore, not deductible.

HOROSCOPE MACHINE

(No. 11038—City Collector—M. H. F.—March 1, 1948.)

An automatic machine that distributes cards upon which horoscope information is given is required to be licensed as an automatic amusement machine under the terms of the Municipal Code.

Citation: Municipal Code, Ch. 184.

OPINION OF FOREGOING SYNOPSIS

Your communication of February 18, 1948 states that one of your license investigators has come upon a five cent coin-operated machine which tells horoscopes by turning knobs which indicate various birth dates and months. The horoscopes are on printed cards released to the customer who deposits the coin. The machines are found in 5 and 10 cent and novelty stores. The devices are not licensed and our opinion is requested as to whether they are subject to license as automatic amusement machines under chapter 104 of the Municipal Code of Chicago.

As the machines are automatic ones used within the city for gain or profit from operation and as they do not vend merchandise or anything of value it appears to us that they are designed merely to furnish valueless horoscopes purely for the amusement of members of the public who deposit coins, and being such are subject to license as automatic amusement machines pursuant to the provisions of chapter 104 of the Municipal Code.

Your communication also states that there are in operation certain coin-operated weighing machines which machines automatically issue tickets on which are registered the weights of individuals depositing the coins, on the reverse sides of which tickets are printed so-called "fortunes," and in some instances are alleged character traits of the persons weighed. Our advice is requested as to whether these machines are subject to license.

To reach a decision regarding this second question the factual situation should be developed further in order that a determination may be made as to whether persons using the weighing machines do so for the purpose of ascertaining their weights or for their amusement. The determining factor would seem to be what is offered before the coin is deposited. Do the machines advertise the dispensing of "fortunes" or "character traits," or is a so-called "fortune" or "character trait" just printed on the weight ticket and gratuitously given? If the latter then our opinion is that the machines would not be subject to license under the Automatic Amusement Machines ordinance. It is suggested that you cause the machines to be examined and give us further particulars concerning the above mentioned determining factor.

PRIVATE CLUB

(No. 11048—City Collector—M. H. F.—April 17, 1948.)

In ascertaining the amount of the annual amusement license fee to be paid by a private club for its clubhouse, the floor areas used exclusively for closed lodge meetings should not be included in the computation.

Citation: Municipal Code, 104, 1-7.

OPINION OF FOREGOING SYNOPSIS

We have received a letter from the Secretary of the Independent Order of Vikings reading as follows:

"This organization owns and operates the South Side Viking Temple, located at 6855 South Emerald Avenue, Chicago 21, Illinois.

The building contains: A Ball Room and several lodge rooms, and dining rooms. The Ball Room is used for dances and entertainments; and closed lodge meetings are held in the lodge rooms, and occasionally wedding dinners are served as well as in the dining rooms.

The Ball Room has an area of approximately 5,400 square feet; and application for license for 1948 was filed with the City Collector's Office. According to Chapter 104, 1-3, Ordinance passed by the City Council, November 8, 1947; as amended December 12, 1947, the license fee should be \$100.00 which was paid with the application. Bill received from the City Collector's Office calls for an additional \$200.00, based on a total area of 17,611 square feet, which has also been paid in order to receive the license. This indicates that a license fee has also been charged for the parts of the building used for lodge meetings, and the dining rooms.

We are of the opinion that lodge meetings were business transactions and cannot be classified as amusements and does not come under provisions of Chapter 104, 1-7, Class 2 or any other part of the City Ordinance as of December 12, 1947; and that such parts of the building used exclusively for lodge meetings and not for public entertainments—amusements—need not be licensed in accordance with the City Ordinance.

This matter has been called to the attention of the City Collector's Office and the Building Department without result.

An opinion of your office is respectfully requested whether our society is obligated to pay license on an area of 17,611 square feet which includes all rooms in the building, including those not used for public amusements or only for the Ball Room, 5,400 square feet, used for public dances."

A copy of our reply to the letter is enclosed herewith.

The Public Places of Amusement ordinance, as amended April 15, 1948, provides that in computing floor area of indoor places of amusement only the area of the auditorium, hall, room or rooms used or intended to be used for a performance, show, exhibit or entertainment and the public assembly witnessing or participating in an amusement shall be taken, exclusive of aisle space between fixed seats.

In ascertaining the amount of the annual license fee to be paid by the Independent Order of Vikings for its south side Viking Temple at the above mentioned location, our opinion based upon the facts as stated in the Secretary's letter is that the floor area of the lodge halls used exclusively for closed lodge meetings should not be included in the computation.

If the dining rooms are used only for dining room purposes and occasional wedding receptions and dinners, and not as public places of amusement within the meaning of the word "Amusement" as defined in the ordinance, it is also our opinion that their areas should not be included when computing the amount of the license fee.

It is therefore suggested that you cause a recheck to be made of the South Side Viking Temple premises in accordance with the views expressed in this opinion.

LODGE HALLS

(No. 11051—Ald. 47th Ward—M. H. F.—April 21, 1948.)

Lodge halls used exclusively for lodge meetings are not subect to license as public places of amusement.

The leasing of such halls for private weddings and receptions would not require the owners or persons in control of the halls to be licensed as public places of amusement.

A proposed amendment to the Municipal Code would require the owner or person in control of any property held for rent, gain or profit, to obtain a license.

Ordinance: Mun. Code 104.1-2.

OPINION OF FOREGOING SYNOPSIS

Your communication of March 23, 1948 requests our opinion relative to the status of certain lodge halls under the city's Public Places of Amusement license ordinance, chapter 104.1 of the Municipal Code of Chicago. You state that there are numerous lodge halls in the city wherein fraternal and veterans organizations hold regular meetings and which halls are leased to persons for private weddings and parties; that while these halls are public places of assembly some question has arisen since the recent disaster at 3229 N. Clark Street as to whether they are subject to license and regulation as public places of amusement.

Lodge halls used exclusively for lodge meetings in our opinion are not subject to license as public places of amusement for the reason that such meetings do not come within the meaning of the word "amusement" as defined in section 104-1 of the Municipal Code. For the same reason lodge halls rented out to fraternal and veterans organizations for the holding of regular business meetings would not be subject to license. Furthermore, it is not believed that the leasing of such halls for private weddings and wedding receptions would require the owners or persons in control of the halls to be licensed as public places of amusement. (Opinion given City Collector January 30, 1948.)

The full meaning of the word "parties" as used in your letter is not clear to us. If any of the parties you have in mind are dancing parties or those at which taxable amusements are presented or conducted then the owner or person in control of the hall would be required to procure a public place of amusement license.

Should the proposed amendment to section 104.1-2 of the Public Places of Amusement ordinance, deferred and published April 15, 1948, be passed, then a license would be required of the owner or person in control of any property held for rent, gain or profit which was used as a public place of amusement, this regardless of whether or not the amusement presented or conducted in the premises was taxable under the three per cent Amusement Tax ordinance.

COIN OPERATED RADIO

(No. 11062—City Collector—M. H. F.—June 19, 1948.)

A coin operated radio cannot be licensed under the City of Chicago's Automatic Amusement Machines Ordinance.

Citations:

Ordinance: Municipal Code, 104-4, 104-6.

Case: 46 Fed. 2d 671.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of communications from a Chicago attorney who represents a distributor of a device called "Tradio-ette," who seeks a determination of the question whether the device comes within the meaning of the term "Automatic Amusement Machine" and is subject to license and tax under sections 104-4 to 104-6 inclusive of the city's Amusement ordinance, Chapter 104 of the Municipal Code of Chicago. The communications give the following information: That the Tradio-ette is a coin-operated complete radio, which offers the listener a choice of any broadcasting station on the dial, in the same manner as any home radio. It is designed for use in tavern and restaurant booths and similar places. It plugs into any standard outlet and starts automatically upon the insertion of a coin and shuts off automatically in fifteen minutes. It is said that the average earnings of these radios is approximately \$1.00 a week, not sufficient to warrant the payment of the annual license tax of \$25.00 imposed by the Automatic Amusement Machine ordinance. The attorney contends that these radios do not require any supervision or regulation since the programs received over them have already been supervised and cleared and also that they are instrumentalities of interstate commerce, and being such that no municipality is authorized to levy taxes upon them.

Our investigation shows that it has been held in the case of *Station WBT v. Poulnot* (1931), 46 F. (2d) 671, that radio broadcasting stations are engaged in interstate commerce and that state laws imposing license taxes on radio receiving sets are unconstitutional as imposing burdens on interstate commerce. The court in its opinion stated that such a license tax could not be sustained as a matter of local regulation, for the subject is national, and admits only of one uniform system or plan of regulation,

and that it could not be sustained as a police regulation with an incidental tax to pay the expenses of the regulation, as it has no elements of police.

Chicago's Automatic Amusement Machines ordinance being a pure taxing measure, in our opinion it could not be sustained as a police regulation, and because of the above mentioned court decision we are forced to the conclusion that the so-called Tradio-ette radio receiving set is not subject to tax under the city's Amusements ordinance.

In support of the conclusion herein reached we have been informed that the city attorney of Oakland, California has expressed the same view with reference to the devices in question in an opinion stating that a city tax could not be imposed under a municipal ordinance for the reason that the devices are instrumentalities of interstate commerce and as such free from the imposition of local license levies.

ATHLETIC CONTESTS

(No. 11065—City Collector—M. H. F.—July 31, 1948.)

The Board of Education in leasing its athletic fields or stadiums to professional promoters of athletic contests is required to procure a Public Place of Amusement License and guarantee payment of the tax to the City.

Citation: Municipal Code, 104.1.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 20, 1948 informs us that the Board of Education has been renting or leasing various school stadiums or athletic fields to organizations (not school connected), such as soft ball leagues, etc., which give exhibitions to which admission fees are charged; that these affairs appear to be on a commercial basis, operated for profit in the interest of those giving the exhibitions; and that while the Board of Education derives revenue from the rental of the stadiums and fields, the city has not been receiving the 3% amusement tax on the gross receipts for the admission fees to these exhibitions. Our advice is sought as to whether the exhibitions referred to are subject to the amusement tax and if so, as to the method to be pursued in the collection of the tax.

In an opinion given January 6, 1948 to the attorney for the Board of Education we expressed the view that the occasional holding of athletic contests in Board of Education owned stadiums and athletic fields, of athletic contests engaged in by students of the various Chicago Public Schools, to which contests admission fees are charged, would not subject the Board of Education to the payment of the tax by the Amusements ordinance. The opinion, however, contained the following statement:

"If, however, the Board of Education were to rent an athletic field or stadium for professional athletic contests or to professional promoters of athletic contests then our opinion would be that such contests are subject to the tax and the Board of Education would be required to procure a public place of amusement license pursuant to chapter 104.1 of the Municipal Code and guarantee the payment of the tax to the city."

This quoted paragraph of the opinion rendered the Board of Education we believe is determinative of your first question.

The method to be pursued by you to collect the tax and require the Board of Education to procure licenses under chapter 104.1 of the Municipal Code should be the same as that pursued against any other person subject to the Amusements ordinance and to the Public Places of Amusements ordinance.

It is suggested that you forward the enclosed copy of this opinion to the Board of Education and that you follow it up with such appropriate action as may be necessary to enforce compliance with both ordinances.

PARKING LOT

(No. 11066—City Collector—M. H. F.—July 22, 1948.)

A parking lot is considered as a class II garage and requires the full annual license fee even though operated for a fraction of the year only.

Citations:

Ordinance: Municipal Code, 156-13 to 156-28.

Cases: 368 Ill. 112.

368 Ill. 282.

OPINION OF FOREGOING SYNOPSIS

You have transmitted to us by your communication of July 14, 1948, a letter from a firm of Chicago attorneys and a letter from Illinois Sport-service, Inc., relative to the adjustment of license fees for the operation of parking lots adjacent to the Chicago Stadium, and you request our opinion on the matter.

The last mentioned letter states that the Illinois Sportservice, Inc., operates two parking lots adjacent to the Chicago Stadium at 1800 W. Madison Street; that the parking lots are used only for convenience of people attending events at the Stadium and are not used for parking at any other time; that the Stadium does not operate during the months of June, July, August and September and during the other eight months of the year, is in operation only an average of three nights per week; that your office has requested the company to procure a Class II Garage license, which license applies to regular parking lots and garages; and because the fee is based on area, it would result in extreme hardship to the company. The letter requests that some adjustment be made in the fee.

The statement concerning the limited operation of the Stadium is somewhat surprising, as our understanding has been that its owners hold the building out to the public for paying engagements at all seasons of the year. However, under the statements made in the letter the parking lots are used during the major portion of each year and presumably used as places for the parking for hire of motor vehicles, or where rent or compensation is paid the owner, manager or lessee of the premises for the storing or keeping of motor vehicles.

Such parking lots fall within the definition of the term "public garage" and are classified as Class II garages under the City's Public Garages license ordinance, sections 156-13 to 156-28 inclusive of the Municipal Code of Chicago. Section 156-15 makes it unlawful for any person to engage in the business of a public garage without first having obtained a license therefor. The fee section imposes an annual license fee based upon the capacity of the premises.

No reduction in the amount of the annual fee is provided for where the licensee operates less than the full license year, except in the case of a newly established business beginning its operation after the commencement of the license year. The Supreme Court of Illinois has upheld the validity of the ordinance against attacks of operators of parking lots in the following cases: *Stearns v. City of Chicago* 368 Ill. 112, and *City of Chicago v. Ben Alpert, Inc.*, 368 Ill. 282; hence, nothing can be gained by Illinois Sportservice, Inc., or its attorneys, in urging that parking lots are not public garages or entitled to treatment different from that given all other public garages.

Inasmuch as the Illinois Sportservice, Inc., is engaged in the business of public garage at the premises mentioned and no provision is made in the Public Garages ordinance for adjusting the amount of the annual license fee to meet the operating conditions referred to in the correspondence, our opinion is that the company is subject to license as a Class II garage and the payment of the full annual fee for each of its said garages.

AMUSEMENT PARK

(No. 11067—City Collector—M. H. F.—July 23, 1948.)

The 3% Amusement Tax is assessable against the gross receipts derived from the Riverview Park Company admission fees, and against all gross receipts from admission fees or other charges, exclusive of federal taxes.

Citation: Municipal Code, 104.

OPINION OF FOREGOING SYNOPSIS

Your communication of July 19, 1948 informs us that Riverview Park Company has filed amusement tax returns on gross receipts for admission charges under the provisions of chapter 104 of the Municipal Code of Chicago for the months of May and June, 1948, and tendered two checks, one for \$394.91 to cover tax for May, and the other for \$540.38 to cover tax for June. You make it clear that these tendered payments cover 3% of the gate admission fees to the amusement park only, and that the returns and the tendered checks do not account for or pay the taxes on the various amusements held within the park to which admission fees or other charges are made to witness or to participate in such amusements.

Our advice is sought with reference to the following questions:

1. Are the amusements given within the amusement park known as Riverview Park subject to the 3% tax in addition to the tax on gate admissions to the park.

2. If so, (a) shall the checks presently tendered be now accepted and receipts issued therefor, and steps be taken to enforce payment of the tax on the amusements within the park, or (b) shall the checks be returned to the remitter and action be taken to collect the total amount of the tax due and payable.

In answer to question 1 our opinion is that the 3% tax is assessable against not merely the gross receipts derived from the grounds admission fees but also against all gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or participate in the various amusements held within the park. This appears to be the plain intent and meaning of section 104-2 of the code.

With respect to question 2, we notice that the tendered checks are voucher checks and that the notations on them are "Tax on gross receipts for admission fees etc. for month of May, 1948" and "Tax on gross receipts for admission fees etc. for month of June, 1948," respectfully. This indicates to us that the Riverview Park Company is tendering the checks in full payment of its entire obligations under the ordinance for the months mentioned. Obviously it is not paying any tax on the gross receipts from admission fees and charges to the various amusements held inside the park grounds.

Under the circumstances it is believed you should return the tax returns and the checks with your demand that the full amount of the taxes on both gate admissions and admission fees or charges to the various amusements held within the park be paid.

Your attention is invited to section 104.1-6 of the Municipal code, which requires the Riverview Park Company, as owner or person in control of the park property, to execute a written undertaking conditioned that the taxes imposed upon any amusement at the licensed premises will be paid in the manner and at the times provided in chapter 104.

If we are to assume that the Riverview Park Company has already procured a public place of amusement license for the current year and filed the written guaranty, you should call upon it to perform its undertaking under the guaranty.

Should the company refuse or neglect to promptly make the necessary and complete returns and see the City paid all amounts of taxes due and owing the City under the code provisions, then you should take appropriate action to compel payment or revoke the company's license and close the park.

Of course in those cases where a concessionaire or operator of an amusement has paid the tax direct to the city, the same tax could not again be collected from the Riverview Company. The Riverview Company, is, however, made responsible for the payment of all taxes imposed upon amusements conducted on its premises.

"TELEQUIZ" MACHINE

(No. 11070—City Collector—M. H. F.—July 30, 1948.)

The keeping and use of "Telequiz", a question and answer coin machine, is not prohibited within the city. The device, however, is subject to the Automatic Amusement Machine Tax.

Citations:

Ordinance: Municipal Code, 104-1, 104-4 to 104-6.

Cases: 366 Ill. 256.

316 Ill. App. 161.

6 S. E. 2d. 20 (So. Caro.).

13 S. E. 2d. 630 (So. Caro.).

OPINION OF FOREGOING SYNOPSIS

You have referred to us a letter from the Vice-President of the Telequiz Corporation, with enclosures, and you request our opinion whether a so-called "Telequiz" game or device, when placed in taverns or other places of public resort in the city, would violate any city ordinance or state law, and whether a license would be required for its operation.

As described in the letter and the illustrated circular accompanying the letter the device is a coin-operated quiz game. Structurally it consists of a cabinet holding a picture machine consisting of a 35 mm. Still Projector, photo cell amplifier, score set up unit, question advance unit, selector and automatic start and stop units. Upon the deposit of a 5¢ coin the player has a chance to answer questions on various subjects. A complete game consists of five questions for each coin inserted. The questions are projected on a 9" x 12" screen with up to six possible answers to each question. The player selects what he thinks is a correct answer by pushing one of six numbered buttons. A green mortarboard hat lights up on the electrically operated score board if the correct answer is selected; a red hat is lighted when an incorrect answer is selected. The correct answer is disclosed on the screen after each play. The score board consists of three dials which indicate the number of the question showing, the time allowed to answer the question, and the total scoring device on which the score made by the player is shown. Players' ratings are also shown, such as "Genius," "Expert," "Good," "Fair," etc. A clock device controls the time in which a particular game must be played. It is said that each machine contains thousands of questions on 16 mm. film. The question films are changed periodically. It is claimed that with a playing time of 1 minute and 15 seconds, the device has an earning power of \$2.40 per hour at 5¢ play. The machines are placed by the distributor on locations on a share of the profits basis.

Obviously the device does not come within the definition of bagatelle or pigeonhole so as to bring it within the prohibition of section 193-26 of the Municipal Code of Chicago.

Considering it with a view of determining whether it violates the Illinois gaming or lottery laws or the city's ordinance prohibiting lotteries and gambling devices, our opinion is that it does not. It does not appear to be a pay-off gambling device as nothing in the way of financial reward is given the player in return for the coin deposited by him. When the lottery test is applied the element of prize seems to be lacking. The Supreme Court of Illinois, in the case of *Iris Amusement Company v. Kelly*, (1937) 366 Ill. 256, has held that a lottery consists of three ele-

ments (1) price, (2) chance, (3) prize. In the "Telequiz" game a price is paid in the form of a coin deposited in the coin slot. As to the element "prize," if the machines were to reward the player attaining a high score or rating with something of value, a free game or even prolonged play, then we would have no hesitancy in declaring the element of prize to be present. (*People v. One Pin Ball Game* (1942), 316 Ill. App. 161.) However, no such reward is involved. True, authorities are to be found in other states which hold the amusement or entertainment a player derives from his success in running up a score are things of value. (*Alexander v. Hunnicutt*, 196 S. C. 364, 13 S. E. (2d) 630; *Alexander v. Martin*, 192 S. C. 176, 6 S. E. (2d) 20.) We have found no decision of an Illinois court which goes to this length, and until one is made the more reasonable course would seem to be to conclude in the matter before us, that the element of prize is lacking. As all three elements are required to constitute a lottery and "prize" is lacking, it is unnecessary for us to inquire into the question whether the element "chance" is present. However, should at any time a prize in the form of money, merchandise or other thing of value be given in connection with the game, then it will be necessary that a determination be made as to whether "chance" is involved.

The question remaining for consideration is whether the device is subject to tax under the City's Automatic Amusement Machines ordinance, sections 104-1 and 104-4 to 104-6 inclusive, of the Municipal Code. Such it appears to be. Very definitely it is designed for amusement. In fact the illustrated circular in describing its appeal to prospective players states, "many clever cartoons with a humorous slant will tickle their funnybone." Section 104-1 defines the term "automatic amusement machine" to mean "any mechanical amusement machine or device, the operation of which is governed or controlled by the deposit of a coin or token * * *." Section 104-4 imposes an annual tax of twenty-five dollars upon each automatic amusement machine used within the city for gain or profit from operation, and section 104-5 makes it unlawful for any person to deliver or install an automatic amusement machine within the city for use by any other person for gain or profit from operation, or for any person to install, keep, maintain or use upon his premises any automatic amusement machine upon which the tax has not been paid and for which a license has not been issued for the current year.

Therefore, the keeping and use of "Telequiz" is not prohibited within the city, but the device is subject to the Automatic Amusement Machine tax.

HOTEL BALLROOMS

(No. 11071—City Collector—M. H. F.—August 2, 1948.)

Hotel banquet and ballrooms used exclusively for private gatherings of families or organizations are not subject to license as public places of amusement.

Citation: Municipal Code, Ch. 104.

OPINION OF FOREGOING SYNOPSIS

You have transmitted to us a letter from the Secretary of Greater Chicago Hotel Association raising a question as to the application of the

city's Public Places of Amusement ordinance to banquet halls and ballrooms engaged by individuals, families and organization for affairs to which the public is not admitted. The letter reads in part as follows:

"As you know, many Chicago hotels operate public rooms for which they have, of course, secured cabaret, food dispensers, as well as a score or more of other licenses and inspection fees, and this letter does not concern those rooms. Many of these same hotels, and also other hotels, have available various rooms which are from time to time rented to private parties and organizations for particular uses. These involve many private affairs of limited or restricted attendance which in no way constitute the use of the room as a 'public place of amusement.' Therefore, no license should be required under Chapter 104.1 of the Municipal Code for such rooms.

To be more specific, these banquet and ballrooms are used almost without exception for luncheons, banquet, dinners, weddings, receptions, etc. These rooms are engaged by individuals and families, and in addition thereto, such organizations as the Rotary Club, Kiwanis Clubs, Lions Clubs, church and fraternal organizations, political and business groups, and other similar entities. The bulk of these private affairs are luncheons, dinners, banquets, and meetings, and of course, the size of the room required is generally determined by the number of members or guests expected to be in attendance. In most instances the individual or organization engaging the room merely invites his guests and makes no charge at all. In some cases tickets or other means of identification are distributed to the members of the group or to persons affiliated with the group.

At some of these affairs in the various hotels, music is provided for the occasion, and in some instances, dancing to be participated in by those guests in attendance. This is particularly true in the many weddings and receptions which are held in these various rooms. It goes without saying that each of these wedding receptions are attended by friends of the bride and groom and their families. Such parties are not attended by nor are they open to the public in any way.

Accordingly, we respectfully submit that the intent of the City Council in adopting the present provisions of the City Code was not to include banquet, ballrooms, or meeting rooms in hotels which are used for private affairs. This borne out by fact that no material change was made in the wording of the former ordinance regarding public places of amusement, which ordinance has never been construed as applying to these rooms."

Chapter 104.1 of the Municipal Code of Chicago defines "public place of amusement" to mean any building or part of a building, park or other grounds used or intended to be used for any amusement as defined in chapter 104 of the Code. It makes it unlawful for the owner or person in control of the property to produce, present or conduct thereon or to permit any person to produce, present or conduct thereon, for gain or profit, any such amusement, without first having obtained a license for a public place of amusement. All places of public amusement are divided into three classes. The annual license fee is graded according to seating capacity and floor and field area.

Chapter 104, the Amusements ordinance, defines the word "amusement" to mean any theatrical, dramatic, musical or spectacular performance, motion picture show, circus, rodeo, animal act, athletic contest, sport, or similar exhibition, and includes, without being limited thereto, poultry, animal and floor shows, boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basket ball, soft

ball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games, and the operation of automatic amusement machines and other mechanical devices and apparatus.

As the public places of amusement required to be licensed under chapter 104.1 are limited to those places wherein amusements as defined in chapter 104 are produced, presented or conducted, it is not seen that the banquet and ballroom of hotels, when used only for the private affairs mentioned in the Hotel Association's letter, which affairs do not fall within the definition of the word "amusement," would be subject to license as public places of amusement.

If, however, the hotel rooms referred to should at any time during the license tax year be used for any amusement as defined in chapter 104, then such rooms would be subject to license as public places of amusement and the owners or persons in control of the hotels would be required to procure licenses and to pay the license fees exacted by the fee section of chapter 104.1.

LIVESTOCK SHOW

(No. 11074—City Collector—M. H. F.—September 7, 1948.)

The City of Chicago Amusement Tax is a tax on programs or gatherings produced for gain or profit. The Live Stock exposition is sponsored annually by the International Live Stock Exposition Association which is a non-profit corporation. Such exposition is therefore not subject to the tax.

Citation: Municipal Code, Ch. 104.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date forwards a letter from the International Live Stock Exposition Association. Henry W. Marshall, President, in which the contention is made that the gross receipts from admission fees to witness the International Live Stock Exposition to be held in the International Amphitheatre, Union Stock Yards, from November 27 to December 4, 1948, are not and should not be held subject to the three per cent tax imposed by the city's Amusements ordinance, chapter 104, Municipal Code of Chicago. Our opinion is requested concerning the matter.

The Association's letter reads as follows:

"The International Live Stock Exposition Association is a 'non-profit' corporation organized under the laws of the State of Illinois. It operates the International Live Stock Exposition held in the Amphitheatre at the Union Stock Yards in Chicago.

For the reasons stated below and the facts cited in support thereof, it is firmly believed that this Association is not and should not be held liable for any obligation to pay a license (amusement) tax to the City of Chicago under Section 104-1, Chapter 104 of the Municipal Code of Chicago.

The International Live Stock Exposition Association is not connected with or affiliated in any manner with any other corporation.

The Association does not operate for 'gain or profit' nor is its Exposition an 'amusement'; therefore, its activities do not fall within the purview of the Municipal Code above referred to. It was organized and functions for educational purposes solely as hereinafter outlined.

The International Live Stock Exposition Association has been officially ruled by the Federal Bureau of Internal Revenue to be 'An Educational Organization—Not For Profit.' Documentary evidence of this ruling is available for submission if desired.

All sums of money received from admissions, entry fees and from every other source are expended for the advancement of scientific research and education in the interest of the betterment of agriculture. No dividends are paid to anyone. It pays no compensation to its officers and directors. There is no accumulation of surplus for the reason that it is the policy of the Association to pay out in prizes, as an inducement to improve the products of agriculture, the excess, if any, over the costs of operations.

The following facts are cited in support of our contentions:

1. It has been officially exempted from payment of Federal Income Taxes and Social Security Taxes. Prior to 1941 the Association paid no taxes. The Federal Revenue Act of 1941 imposes upon everyone, without exception, a tax upon 'Admissions,' irrespective of whether an 'amusement' or otherwise. This in nowise implies an obligation to pay an 'amusement-license tax' to the City of Chicago.

2. It neither operates, sells nor leases any so-called carnival concession privileges, and does not permit the operation of any such on the premises.

3. It does not sell advertising or commercial display space.

4. The Association owns no physical assets.

Upon this letterhead will be found a list of officers and directors of the Association. Included therein are the names of several deans and professors of agricultural colleges of the country, together with names of breeders of pure-bred livestock, etc. The Association encourages the agricultural colleges and others to prepare animals, under their own theory of feeding, and to exhibit these animals at the Exposition where an opportunity is presented to compare the results of one operation with the others. The same encouragement and opportunity is afforded the members of the 4-H Clubs and breeders and feeders of livestock throughout the nation.

The representation of the agricultural colleges on its Board of Directors, together with their participation in the competitions of the Exposition, indicate their interest in the Association. Through the numerous educational exhibits which are put on at the Exposition, they indicate their recognition of the opportunity afforded these institutions to demonstrate their latest experiments, discoveries, progress and accomplishments for the benefit and betterment of agriculture generally. The United States Department of Agriculture stage their largest educational exhibit of the year at the Exposition as do a number of the State Departments of Agriculture.

It is owing to the educational and competitive opportunities afforded through these policies and methods that the present high standard, quality and economic advantages of livestock and other products of agriculture have been obtained.

The Exposition has long been recognized as a Supreme Court by the nation's leading livestock breeders, farmers and grain growers, who send the winners at state and sectional fairs and expositions to Chicago each year for final judging.

The 4-H Club holds its national annual convention during the course of the Exposition and their achievements are displayed and similarly judged in connection therewith. Various other agricultural products, such as grain, corn, hay, etc., are similarly displayed and judged at the Exposition.

In the arena is staged the Junior Livestock Judging Contest which is made up of young men and women who have not had the advantage of an agricultural college education. These individuals are given an opportunity to pass upon species of livestock and they are graded, as to their ability and knowledge of livestock, by experts from the agricultural colleges who render such services without compensation. Agricultural college scholarships are awarded to the winners by The Chicago Association of Commerce and Industry. In the arena is also staged the Collegiate Livestock Judging Contest which is made up of teams representing the agricultural colleges of the country.

In order to secure unbiased and unprejudiced decisions, the Association imports a foreign judge to pass upon the various steers and select the grand champion therefrom.

In the arena is also staged a display of fine saddle horses, fine harness horses, heavy draft horses and purebred cattle, which are brought together for the purpose of establishing a guide for the breeders of these animals for future production. While the arena performance may have the appearance of an amusement feature, it is only incidental to the aims, purposes and conduct of the Exposition as a whole.

In emergencies, such as an epidemic of foot and mouth disease, a serious invasion of the corn borer, etc., the Association takes an active part in the scientific and other efforts to combat the same.

The foregoing related facts establish that the primary function of the Association is in the improvement of the general field of agriculture and it is not engaged in the operation of an amusement business.

In view of the foregoing presentation, we are assuming that there will be no liability on the part of the Association or anyone else for the payment of a City Amusement tax in connection with the Exposition which is occasionally held by it. In view of the fact that the 1948 Exposition is only a short time away, we will appreciate it greatly if you will advise us promptly if our assumption is not correct."

The word "amusement" is defined by section 104-1 of the ordinance to mean, "(1) any theatrical, dramatic, musical or spectacular performance, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition for public entertainment, including without being limited to, boxing, wrestling, skating, dancing, swimming, racing or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling, billiard and pool games; (2) any entertainment offered for public participation, including, without being limited to, dancing, carnival or amusement park rides and games, bowling, billiard and pool games."

Section 104-2 provides:

"A license tax is imposed upon all amusements within the city, excepting automatic amusement machines, of an amount equal to three

per cent of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements. It is unlawful for any person to produce, present or conduct any such amusements, for gain or profit, without payment of the tax."

There is no provision in the ordinance which specifically exempts any person from payment of the tax, and this department in numerous opinions has expressed the view that the mere fact that amusements are offered by or for nonprofit corporations or associations, or that the net receipts are used for educational purposes, does not exempt them from the tax, if the amusements are produced, presented or conducted in regular course as a profession or in the operation of an amusement business. We have also held that the license tax is necessarily an occupation tax, and being such not applicable to an isolated or occasional amusement offered for the benefit of some religious, educational, charitable or social organization. In an opinion given you April 20, 1948 our determination was that the tax was not applicable to the gross receipts from admission fees to witness the professional circus held annually in and presented by Medinah Temple, the net proceeds of which are donated to charity.

The Association's letter states that the Association is not connected with or affiliated in any manner with any other corporation. We assume this statement means that it is not connected with the Union Stock Yard and Transit Company, owner of the Union Stock Yards and the International Amphitheater. It rents the Amphitheater and adjoining buildings from the Stock Yard Company and doubtless the holding of the Exposition inures to the financial benefit of the Stock Yard Company though this fact seemingly would have no bearing upon the matter before us. The Association points out that it is a nonprofit organization; that it pays no dividends to anyone; that its officers and directors do not receive any compensation; and that its entire net proceeds from the Exposition are paid out in prizes as an inducement to improve the products of agriculture. It stresses the point that it is not engaged in the amusement business and that such entertainment features as the horse show and other arena performances are incidental merely to the Exposition as a whole.

Manifestly, the principal purpose and function of the Association and the Exposition are educational in the field of agriculture and animal husbandry, for the exhibition and display of farm products, and not for financial profit. From the information supplied in the Association's letter it is not seen that the Association could be held to be engaged in business for pecuniary gain. Business connotes financial profit, pecuniary gain. This it is said is not the object of the organization and it is borne out by the fact that the Association makes no profits and pays out to its members no pecuniary rewards, but on the contrary puts back all receipts over and above expenses into the work of encouraging breeder and feeders of live stock, raising better farm products, promoting agricultural colleges, 4-H Clubs, and stimulating interest in farm life.

The tax is imposed, not upon all amusements within the city, but only upon such as are produced, presented or conducted for gain or profit. (Section 104-2.) It is an occupation tax, one imposed upon those regularly engaged in the operation of an amusement business. The Association, a nonprofit organization, as we view it is not engaged in the amusement business for pecuniary gain or profit.

Based upon the information given us no other conclusion appears justified than that the gross proceeds from admission fees to witness the Exposition are not subject to the three per cent amusement tax. Such is our opinion.

MOTION PICTURE SHOWS

(No. 11093—City Collector—M. H. F.—December 14, 1948.)

There is no provision in the Amusement Tax Ordinance exempting any person from payment of the tax and any organization showing motion pictures for gain or profit is subject to the tax, the fact that the organization loses money by the venture is immaterial.

Citation: Municipal Code, 104, 104-1.

OPINION OF FOREGOING SYNOPSIS

You have requested our opinion as to whether the Institute of Design, 632 N. Dearborn Street, is subject to tax and license under the provisions of chapters 104 and 104.1 of the Municipal Code of Chicago.

With your letter of request you forward a report of an investigation of the Institute made by one of your investigators and a letter from the Institute's Executive Secretary. It appears from these documents that the Institute presents motion pictures to which entertainments the public is invited and charged admission fees of \$.75 per person, and \$.25 per student.

Section 104-1, the definition section of the Amusements ordinance, specifically includes motion pictures within the word "amusement." Section 104-2 imposes a tax upon all amusements within the city, excepting automatic amusement machines, of any amount equal to three per cent of the gross receipts from admission fees or other charges, exclusive of federal taxes, to witness or to participate in such amusements, and makes it unlawful for any person to produce, present or conduct any such amusements, for gain or profit, without payment of the tax.

There is no provision in the Amusement ordinance exempting any person from payment of the tax, and as the motion pictures are produced for gain or profit, the fact, if it be the fact, that the Institute loses money by the venture, can make no difference, and our opinion is that the Institute is subject to the payment of the tax.

The amusements being subject to tax, the owner or person in control of the property whereon the amusement is produced, presented or conducted, is subject to license under the Public Places of Amusement ordinance, chapter 104.1 of the Code.

CHAPTER VII — BUILDING AND ZONING

A. BUILDINGS

CITY INSPECTION OF STATE OWNED BUILDING

(No. 10736—Commissioner of Buildings—M. H. F.—February 3, 1943.)

A grain elevator owned by the State of Illinois and occupied by a railroad company under a lease is subject to inspection and the fee charged therefor by the City.

Citations:

Statutes: IRS '41, Ch. 24, par. 23-70—23-72, 23-105.

Ordinance: Municipal Code, Ch. 46.

Cases: 297 U.S. 175, 186.

130 Ill. 238.

264 Ill. 208, 209.

311 Ill. 234.

OPINION OF FOREGOING SYNOPSIS

Your communication of January 24, 1943 requests our opinion as to the status of property occupied by a grain elevator on the south branch of the Chicago River between Ashland and Damen Avenue. You state that a railway company occupies this grain elevator but claims that the same is the property of the State of Illinois and as a consequence the annual inspection fees earned by your department for inspection of the building pursuant to the building ordinance are not properly chargeable. Specifically the question presented is whether the inspection fees are properly chargeable against the Santa Fe Railway Company even though the title to the land and elevator building is in the State of Illinois.

We have inspected the records in the office of the Recorder of Cook County and particularly the copy of document No. 10206804 filed for record November 15, 1928, and find this to be an indenture (in the nature of a warranty deed) by which the railway company conveyed to the State of Illinois the land in question together with all buildings and improvements on said premises. It is stated in the document that the conveyance is made pursuant to a stipulation and agreement whereby the title shall revert to the grantor under certain conditions. It therefore appears that the State of Illinois holds title to the land and building and that the railroad company is the occupant under an agreement whereby it has secured the use of the elevator for a period of time ending October 25, 1948.

Presumably the present leasing from the State to the railway company is pursuant to the provisions of the fifth paragraph of section 8 of the Illinois and Michigan Canal Act, chapter 19, Illinois Revised Statutes, 1941, which paragraph confers power upon the Department of Public Works and Buildings to lease for periods not exceeding twenty years any of the canal lands, or elevators, and adjoining property owned by the State.

It is not denied that the railway company now has the exclusive occupancy and control of the elevator.

Obviously the elevator building is a structure required to be regulated and inspected periodically by your department pursuant to the provisions of Chapter 46 of the Municipal Code of Chicago. Broadly considered, if buildings such as this and other grain elevators located within the city, which are potential fire and safety hazards, are not subject to regulation under the police powers of the city dire consequences probably would result, consequences which we do not believe the State should countenance or the railway company favor. The fees assessed are merely incidental to the inspection services rendered as they are charged to defray, in part at least, the cost of the necessary surveillance. If the salutary regulations of the building ordinance may be defeated or nullified by the disinclination of lessees and exclusive occupants of buildings to pay inspection fees, then by the same token the essential fire prevention regulations of the Municipal Code might be destroyed or neutralized. It is not believed that the law of Illinois favors or that it was the intention of the legislature of the State to make possible such a situation.

In express grants the legislature has conferred upon municipalities in Illinois very broad police powers, among which are those contained in the following sections of the Revised Cities and Village Act, chapter 24, Illinois Revised Statutes, 1941:

23-70. To prescribe the thickness, strength, and manner of constructing all buildings and of the construction of fire escapes thereon.

23-71 For the purpose of guarding against calamities of fire, to prescribe the limits within which wooden buildings shall not be erected, placed, or repaired, without permission, and, whenever buildings within the fire limits have deteriorated or have been damaged by any means to the extent of fifty per cent of their value, to direct that such buildings shall be torn down or removed and to prescribe the manner of ascertaining whether the specified damage has occurred.

23-72. To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, furnaces, pipes, ovens, boilers, and any other fire or heating apparatus used in and about any building; and, if they are in a dangerous condition, to cause them to be removed or placed in a safe condition; to cause all buildings and enclosures which are in a dangerous fire condition to be put in a safe fire condition; to regulate and prevent the carrying on of factories that are dangerous in causing or promoting fires; and to prevent the deposit of ashes in places that create a fire hazard.

23-75. To regulate and prevent the storage of * * * combustible or explosive material.

23-105. To pass and enforce all necessary police ordinances.

The police power while hardly susceptible of exact definition has been defined in general terms by the Supreme Court of Illinois "as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public." *Culver v. City of Streator*, 130 Ill. 238. Among the most important of police powers are those of caring for the safety of the community and guarding against the hazards of fire. These powers are coextensive with self-preservation. By virtue of the authority to enact building and other police ordinances the Supreme Court has held that a duty is imposed upon the city in the protection of the public from the dangers of fires in buildings growing out of the manner of construction and use of such buildings. In *City of Chicago v. Mandel Bros.*, 264 Ill. 208, the court specifically stated (p. 209):

"The protection of the public against such danger is a subject thus delegated to the municipality."

It is also well settled that in the exercise of its delegated police powers the city acts as the agent of the State. In the exercise of such powers it functions not in its proprietary but in its governmental capacity. It is essentially a local unit of government, invested with a portion of the sovereign power of the State for the benefit of the inhabitants. In discussing the police powers exercised by a city the Supreme Court in the *Culver* case held that in those matters the city acts as the agent of the State, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare. On page 245 of its opinion the court said:

"The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public."

Does its mere ownership by the State exempt the elevator building and free the exclusive occupant and operator thereof from compliance with the provisions of the ordinance, an ordinance enacted pursuant to express grants of power delegated by the legislature? We think not. The elevator is a building located within the territorial limits of the city and the General Assembly has invested the municipality with power to regulate all buildings within the city. The State as an entity acts only through the General Assembly and the scope of the authority of State officers is measured by the laws of the State enacted by the General Assembly. State officers in the performance of their official duties as well as all other persons must obey the laws of the State.

In the case of *County of Cook v. City of Chicago*, 311 Ill. 234, a bill was filed by the County to enjoin the city from enforcing its fire ordinance against the county in the construction of a county jail. It was contended that since the county was a mere subdivision and agency of the State the city had no authority to enforce its ordinances against buildings constructed by the county. The Supreme Court however overruled the contention and held that the county was obliged to comply with the ordinances of the city in which its building was located. In the court's opinion it was pointed out that the powers granted to counties under the general law did not include the police power and that the police power had been granted to the city and by statute extended to all buildings within the city's limits. When it was urged that the county is an arm of the State to which had been committed the control of county buildings, and that therefore it was not subject to the police power of the city, the court held that while the county was an agency of the State it was not correct to say that the county was a part of the State in the exercise of the police power.

While we are not called upon to decide whether a state-owned building which is devoted to State uses is amenable to the city's regulations, we believe there is no immunity when the only exercise of the police power affecting it is that applied by the city under express grants of power from the State and as an agent of the State. The obvious purpose of the ordinance regulations, promulgated with the sanction of the State, is to protect employees and the public, and also property, from injury from the maintenance and use of defective buildings. The danger to be apprehended is as great whether the defective building is state-owned or privately-owned. Furthermore, no convincing reason is seen why a state-owned building should not receive the benefit of the surveillance given under the ordinance equal with a privately-owned building. Neither can we perceive any reason why a state should not be bound by its own statute and regulations en-

acted pursuant to the statute. The canon of construction that a sovereign State is presumptively not intended to be bound by its own statute unless named herein, is a rule which has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. With reference to this rule of construction the Supreme Court of the United States in the case of *United States v. California*, 297 U. S. 175, at p. 186 said:

"The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated."

The language employed in the hereinbefore quoted sections of the Cities and Villages Act so clearly indicates the intention of the General Assembly to provide for the regulation of *all* buildings within the territorial limits of cities, that the conclusion seems inescapable that a state-owned building would be included.

We are of course sensible to the fact that the city may not sue for and recover inspection fees from the State of Illinois, for the reason that the State cannot be sued by its citizens or one of its political subdivisions. This immunity from suit however does not exist in the case of a railway corporation.

It is therefore our opinion that because the State of Illinois has delegated to the City of Chicago the broad police powers hereinbefore mentioned and expressly authorized the city to regulate the construction of all buildings within the city and to pass and enforce all necessary police ordinances, which powers have not been withdrawn or reinvested in any other State agencies, we are forced to the conclusion that the city in the instant case has the authority to enforce the provisions of its building ordinance with respect to the grain elevator in question and collect from the railway company the inspection fees exacted by that ordinance.

APARTMENT VESTIBULE LIGHTS

(No. 10770—Secretary, Committee on Buildings and Zoning—A. F.G.—March 2, 1944.)

The City has no power to enact an ordinance requiring lights in hallways of more than one family dwelling*

Citation: 283 Ill. 271.

OPINION OF FOREGOING SYNOPSIS

We return herewith draft of a proposed ordinance which at the request of the Building and Zoning Committee you brought into this office for amendment. We did not make the suggested amendment and return the

*Editor's Note: By virtue of Ch. 24, Sec. 23-108 IRS 1947, enacted June 6, 1945 the City has been given express power to require lights in the aforementioned class of buildings.

draft for the reason we do not believe the council has power to legally enact this ordinance. The draft is as follows:

"48-68. Every corridor, stairway, or ramp which serves as a required means of exit from more than one dwelling shall be provided with a system of electric lighting which will produce an illumination of five-tenths foot candle on the floor at every corridor angle, corridor intersection, stair or ramp landing, stair or ramp platform or doorway, and an illumination of two-tenths foot candle at every other point on the floor of such corridor, stairway, or ramp; the system of electric lighting as required hereunder shall be illuminated from nightfall to daybreak of each and every day."

In *Stoessand v. Frank*, 283 Ill. 271 (1918) the question of the validity of an ordinance of the City of Chicago similar to the foregoing draft was before our Supreme Court. That ordinance read as follows:

"In every tenement house over two stories high a proper light shall be kept burning in the public hallways near the stairs, upon the entrance floor every night during the year from sunset to sunrise, and upon all other floors of the building from sunset until ten o'clock in the evening." (Section 1422 Revised Chicago Code 1911.)

After citing the well known proposition of law that Municipal corporations have only such powers as are clearly and unmistakably granted to them by the legislature and can exercise no powers except those granted in express words or which are necessarily implied in or incident to powers expressly granted, the court in holding the ordinance invalid, said:

"The power to legislate upon the subject of this ordinance is not given by the cities and villages act or any other act of the legislature, either in express terms or by necessary implication from any powers expressly granted."

It is our opinion, therefore, that the council is without power to enact this ordinance.

WALL OPENINGS

(No. 10788—Commissioner of Buildings—A. F. G.—June 3, 1944.)

Openings in exterior walls are permitted on or near property dividing lines under the Municipal Code if forty-five minute doors or type "A" windows (wire glass) are installed in such openings. The use of glass blocks cannot be allowed if they are less resistant to fire than ordinary glazed windows.

Citations: Municipal Code, secs. 48-14, 61-40, 65-10, 73-13.

OPINION OF FOREGOING SYNOPSIS

Your letter of April 25, 1944, is as follows:

"Your assistance is requested in determining whether there are any provisions in the Municipal Code relative to permitting windows or glass block openings on a building located directly on a lot line.

"It has been the practice of this department to permit, on occasion, the use of windows directly on a property dividing lot line when such windows are constructed of metal with wire glass. To the best of my knowledge and belief, this ruling was purely arbitrary and for that reason your decision is requested first, as to whether the subject matter is covered in the code and secondly, as to whether a property owner has a right to endanger adjoining property with such openings."

The provision in the code for permitting windows in an exterior wall on or near a dividing lot line is found in section 61-40 which is in part as follows:

"In all exterior walls which are required to have a three or four hour fire-resistive value, except in single dwellings of any height and multiple dwellings of three stories or less in height; a forty-five minute fire-resistive door or a type A window shall be installed in every opening through a wall * * * where said opening faces a property dividing lot line at a distance of less than twelve feet; * * *"

Section 65-10 of the code reads as follows:

"Wherever in the building provisions of this code a type A window is required, such window shall be constructed of non-combustible materials and glazed with wired glass as required by the following sections of this chapter dealing therewith."

The "following sections" referred to in the foregoing section are ten in number and provide details for the construction of type A windows.

Section 48-14 which deals with court requirements in multiple dwellings is as follows:

"The jamb of any window, or door, in a wall of a court forming an angle with an abutting lot line shall not be nearer than one and one-half feet to such lot line."

This section seems to conflict with section 61-40 which permits openings in exterior walls facing a property dividing lot line at any point less than twelve feet from such lot line if a forty-five minute door or a type A window is installed therein. Section 48-14 permits a door or window jamb to be not nearer than one and one-half feet to any such lot line regardless of the kind of door or window installed in the opening.

We think section 48-14 is unnecessary and should be repealed for the reason a window or door jamb in a wall forming an angle with a lot line as a practical matter cannot be approximately nearer than one and one half feet to such lot line. If you know of a better way of reconciling these sections may we have your suggestion.

The only provision in the code relating to glass block construction is section 73-13 which is in part as follows:

"Glass block construction consisting of glass block units not less than three and three-fourths inches thick, laid in approved masonry mortar and properly bonded or adequately reinforced with metal may be inserted wherever window openings are permitted, if properly constructed as a substitute for glazed sash and window frames. * * *"

You advised the writer that glass blocks have no more fire resistance than ordinary glazed windows. That being so they should not be used in openings in walls nearer than twelve feet to a property dividing line.

From the foregoing we are of the opinion that openings in exterior walls on or near property dividing lot lines are permitted if forty-five minute doors or type A windows are installed in such openings. The city council evidently did not consider adjoining property endangered by this type of construction or it would not have permitted it.

WARRANTS FOR BUILDING VIOLATIONS

(No. 10806—Commissioner of Buildings—M. H. F.—July 27, 1944.)

In ordinary cases a prosecution for a building code violation should be instituted by a summons. In emergency cases, when delay might jeopardize life or health a request for a warrant in the first instance would be justified.

Citations:

Statute: IRS ch. 24, sec. 10-8, '43, ch. 37, par. 442, et seq.

Cases: 254 Ill. 360.

Other reference: 18 Op. Corp. Coun. 375.

OPINION OF FOREGOING SYNOPSIS

Your communication of July 24, 1944 requests our advice as to the proper procedure to be followed by your department in the event it is found desirable to have a warrant sworn out in an emergency for a violation of the building provisions of the Municipal Code of Chicago.

Violations of the building provisions of the Municipal Code are prosecuted in the Municipal Court of Chicago by what are termed quasi-criminal actions. Quasi-criminal actions are civil actions at law, civil in form and quasi-criminal in character. Section 2 of the Municipal Courts Act (paragraphs 442 et seq., chapter 37, Illinois Revised Statutes) groups into six classes all cases within the jurisdiction of the court and places quasi-criminal actions, except bastardy cases, in the fifth class. Section 26 of the act prescribes the practice in fifth class cases, and provides for the issuance of a warrant in the first instance only in those cases where (1) the facts constituting the offense complained of also constitute, in whole or in part, a violation of the Criminal Code, and (2) where the person procuring the warrant states under oath that an ordinance has been violated and that he has reasonable grounds to believe that the party charged is guilty thereof and will escape unless arrested.

Notwithstanding the attempted restrictions upon the use of the warrant contained in section 26 of the Municipal Courts Act our opinion is that a further and less restricted use of the warrant may be resorted to and justified under section 10-8 of the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes, which section reads in part as follows:

"In all actions for the violation of any municipal ordinance, the first process shall be a summons or a warrant. A warrant for the arrest of an accused person may issue upon the affidavit of any person that an ordinance has been violated, and that the person making the complaint has reasonable grounds to believe that the party charged is guilty thereof."

While in ordinary cases your prosecutions should be begun by summons, it is believed that in emergency cases when delay might jeopardize life or health, you would be justified in asking for a warrant in the first instance. See Opinions of the Corporation Counsel, Volume XVIII, page 375, and *City of Chicago v. Williams* (1912), 254 Ill. 360. To obtain the issuance of a warrant you would of course be required to file a sworn complaint setting forth therein that a specific violation of a section of the code had been committed and that you had just and reasonable grounds to believe that the defendant committed the offense, and also to satisfy the municipal judge issuing the warrant that the arrest of the defendant by warrant should be made.

REMOVING DILAPIDATED BUILDINGS

(No. 10808—Commissioner of Buildings—F. P. C.—August 12, 1944.)

The City has valid powers under the state statutes to define, present and abate a nuisance and now enjoys all the power in the premises which the state has and is able to legally delegate to it. There is no way of absolving the City from liability resulting from the arbitrary action of city officials in declaring and abating an alleged nuisance which is not a nuisance in fact.

Citations:

Constitution: 14th Amendment Constitution of the United States.

Case: 237 Ill. 300.

Other references: 20 Op. Corp. Coun. 166.

20 Op. Corp. Coun. 178.

21 Op. Corp. Coun. 167.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your correspondence dated January 13, 1944, in which you request our consideration of the desirability of securing enabling legislation empowering the city to declare certain dilapidated and unsightly buildings nuisances, and to provide for their wrecking and removal after public hearings, also to so word said legislation so as to absolve the city and its officers from liability resulting from their demolition.

The city now has ample power under the Cities and Villages Act, Sec. 23-61 (Ill. Rev. Stat. 1943 p. 408) to define, prevent and abate a nuisance and likewise under the general police power. The State has already delegated to the city by the above statutory provisions the same degree of power which it has over the subject and we cannot comprehend how any greater power could be granted by legislation which could be upheld as constitutional. The States' power in the premises is limited by the State Constitution of 1870, Article II, Section 2, which provides substantially that no person be deprived of life, liberty or property without due process of law; and is also limited by the Constitution of the United States Amendment XIV, Section 1, which provides substantially the same as Article II, Section 2 of the State Constitution.

We have rendered numerous opinions on the subject which hold in substance as follows:

"The city is empowered to define, prevent and abate a nuisance but the building or structure must be imminently dangerous to the public health, safety and welfare and a nuisance in fact." (Citing Opinions of Corporation Counsel Vol. XXI, p. 167.)

"If a city declares and abates a building as a nuisance which is not a nuisance in fact, it may be held liable in damages." (Citing Opinions of Corporation Counsel, Vol. XX, p. 178.)

"Where some doubt obtains as to whether or not a building or structure is a nuisance and the city so declares it the courts have generally resolved the doubt in favor of the city." (Citing Opinions of Corporation Counsel Vol. XX p. 178, *Sings v. City of Joliet*, 237 Ill. 300 (1908).)

The constitutions of the State of Illinois and of the United States guarantee the right of every person to the use and enjoyment of his property subject only to the reasonable restraints placed upon it by governmental bodies to protect the general public so that private property cannot be taken without "due process of law." A Constitutional right is involved herein and neither the city, state nor federal government could enact legislation providing for the demolition of a building as a nuisance which is not one in fact. Whether or not it is a nuisance depends upon the facts and circumstances in the particular case. While summary abatement may be justified where a thing is a nuisance per se or where the facts and circumstances show it is imminently dangerous to the public a city which otherwise declares and abates a building or structure as a nuisance does so at the risk of incurring liability if it develops that the said building or structure is not one in fact.

No valid legislation can be enacted to throw a cloak of immunity about the city and absolve it from liability because the constitutional rights of the owners of the property would be jeopardized thereby. Such legislation would undoubtedly be declared by the courts unconstitutional and void.

In conclusion we state that the city now has ample power under the statute to define, prevent and abate a nuisance and now enjoys all the power in the premises which the state has and is able to legally delegate to it; that there is no way of absolving the city from liability resulting from the arbitrary action of the city in declaring and abating an alleged nuisance which is not a nuisance in fact, since this would constitute an unconstitutional taking of private property without "due process of law."

Our suggestion as to the best practical method of bringing about the end in view is after careful investigation and proper notice to declare as nuisances by ordinance and demolish only those buildings which are unquestionably nuisances in themselves, and those that are in their present condition as imminent and immediate danger to the public. As to all other buildings where there is a doubt as to their being nuisances an adjudication should be had by a bill of equity. Under this procedure there would be a minimum risk of the city being held liable in damages. (An exhaustive opinion on the proper procedure and other legal aspect of your problem appears in Opinions of Corporation Counsel, Vol. XX, p. 166.)

RETROACTIVE EFFECT OF BUILDING CODE

(No. 10842—Fire Commissioner—F. V. M.—April 23, 1945.)

The building code is prospective in effect and the Fire Prevention Bureau has no authority to require institutional buildings erected in compliance with regulations in force at the time, to be rebuilt to conform to present regulations. However, in some instances, the sections are expressly made retroactive, in such instances the Fire Prevention Bureau may compel the observance of these regulations by owners of existing buildings as well as those hereafter erected.

Citations:

Ordinances: Municipal Code, 49-5 to 49-9, 49-33 to 49-39.

Other reference: 43 C.J. Sec. 921.

2 Op. Corp. Coun. 696.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of April 13, 1945, in which you request an opinion regarding the proper interpretation of numerous sections of Chapter 49 of the Municipal Code of Chicago, pertaining to institutional buildings in existence prior to 1939.

You submit the following question as a basis for our opinion:

- (a) Do sections 49-5 to 49-9 inclusive apply to institutional buildings in existence prior to 1939? In other words, do these sections prohibit the use for institutional purposes of a wood frame or ordinary constructed building more than one-story in height where such building has been used continuously as an institutional building since 1938?
- (b) Does Section 49-38 require a standard fire alarm system in an institutional building used continuously for such purposes since 1938?

In an opinion written to the Bureau of Fire Prevention in 1942, we had the following to say:

"This will acknowledge your letter of March 24, 1942 which is in part as follows:

* * * *

'Your opinion is requested as to the application of Chapter 49 of the Municipal Code of Chicago, especially Section 49-5, 49-6 and 49-7, to buildings used for institutional purposes prior to the passage of said ordinance. Also, if in your opinion, Chapter 49 does not apply to institutional buildings which were in existence before the passage of the present Code, what regulations if any would this Bureau apply to such buildings?'

The general principle of law applicable here is: Statutes and ordinances operate in the future only, and are never to be given a retrospective effect if susceptible of any other construction. An intention that a statute or ordinance shall have a retrospective operation is not to be presumed but must be manifested by clear and unequivocal

language, and in case of doubt the statute or ordinance must be construed to have a prospective effect only. 43 Corpus Juris, section 921.

There is nothing in the language employed in the building code which indicates any intention to give that ordinance a retrospective effect. On the contrary many things indicate that only prospective operation was intended.

Chapter 60 entitled Existing Buildings and Structures defines an existing building as a building in existence on July 6, 1938. It provides that any work of construction under a permit issued by the building department prior to that date may be completed in accordance with the terms of the permit and the ordinances relating thereto, and the building thus constructed shall be designated an existing building. It further provides that an existing building may be altered, repaired or replaced with the materials and in the forms of construction of the original structure thereof, provided the cost of such alteration, repair or replacement shall not exceed 50% of the cost of constructing a like building. An exception to this is that the building shall not be enlarged or increased in capacity, or converted to any of the uses described in Chapter 51 (Hazardous Use Units) unless the entire building is made to conform to the requirements of the code for new buildings. By this chapter the council intended that buildings erected before the adoption of the present building code, and in compliance with the building ordinances in effect at the time of their erection shall be permitted to exist in that form and further that if such a building is damaged by fire or otherwise to the extent of less than 50% of the cost of erecting a new building, such buildings may be repaired with the materials and in the form provided by the ordinance in effect at the time of their erection and shall not be required to comply with the new code, unless the building is enlarged or converted to a hazardous use.

Other evidences of the intention that the new building code was intended to be prospective only is found in Chapters 47 to 58 inclusive. These chapters deal with the structural requirements of each of the classifications of buildings enumerated in the code. Nearly all of these chapters begin with a sentence substantially as follows: 'Every building or part thereof *hereafter* designed, erected, altered or converted or used as building, as defined in section shall comply with the provisions of this code.' This language expressly limits these provisions to buildings subsequently built.

In other of these chapters provisions are to be found indicating the legislative intent that the code was to apply to buildings hereafter erected. As an example, chapter 49 Institutional Buildings the chapter under which your problem arises, provides in Section 49-33 that in every existing institutional building and every institutional building hereafter erected, every room used for the storage or application of anesthetics, shall conform to certain restrictions provided in section 49-34. No other section expressly makes the provisions of this chapter applicable to existing buildings. If the entire chapter applied to existing buildings it would not be necessary as was done here to make certain provisions apply to existing buildings.

Again in chapter 53 Theaters, sections 53-2 to 53-8 apply to 'existing theaters' while sections 53-9 to the end of the chapter apply to 'new theaters.' If as contended the chapter is retrospective all of its provisions would apply to existing as well as new theaters and special provisions applying to existing theaters would be unnecessary.

Section 49-6 to which you refer is as follows:

'Semi-fireproof or a superior type of construction shall be used in any institutional building more than one story and basement in height and not more than seven stories or eighty feet in height.'

We believe the words 'shall be used' mean 'shall be used in building or erecting' and look to the construction in the future of the buildings described.

In 1904 this office was called on to answer an inquiry whether certain provisions in the building ordinance very similar to section 49-6 quoted above applied to buildings constructed prior to the passage of the ordinance. The sections were 169 and 170 of the code providing the kind of construction required in certain class buildings and read as follows:

'169. Buildings of Class IV, containing not more than 600 seats, may be built of ordinary construction. If they contain more than 600 and less than 1,500 seats, they shall be built of slow-burning or of mill construction. If they contain more than 1,500 seats they shall be built of entirely fire-proof construction.

'170. Buildings of Class V containing less than 1,000 seats shall be of slow-burning construction or of mill construction, and if they contain 1,000 or more seats they shall be built entirely of fire-proof construction.'

Corporation Counsel Major Edgar B. Tolman personally wrote the opinion and said:

'It will be observed that every provision of Section 169 looks to the construction in the future of the buildings therein described. The words used are: "May be built" and "shall be built." Section 170 contains the words "shall be" and "shall be built." While the words "shall be" are possibly susceptible of application to existing buildings, yet I believe that the entire context of these two sections shows that the words "shall be" in Section 170 mean "shall be built." I am of the opinion that from the very nature of the provisions of Sections 169 and 170, said sections are not retroactive and do not apply to buildings constructed before the passage thereof.' (Opinions of the Corporation Counsel, V 2, p. 696.)

The city council undoubtedly had authority in the exercise of the police power in order to protect the lives, health, property and welfare of the people to make the provisions of the building code applicable to existing buildings, but from what has been heretofore said it has expressly manifested the intention not to do so.

It is our opinion therefore that section 49-6 is prospective only in effect and you have no authority to require institutional buildings erected in compliance with the regulations in effect at the time they were erected to be rebuilt to conform to the present regulations. However, sections 49-33 and 49-34 are expressly made retroactive. Sections 49-35 to 49-39 inclusive entitled: 'Fire Protection' are by chapter 90 made applicable to existing buildings and sections 49-40 to 49-43 by chapter 66 are also made applicable to existing buildings, and your Bureau may compel the observance of these regulations by owners of existing buildings as well as those hereafter erected."

Section 60-1 defines an existing building as a building or structure in existence on July 6, 1938.

It is our opinion that Sections 49-5 to 49-9, inclusive, are prospective only in effect. Buildings which were erected prior to July 6, 1938, and which have been continuously used as institutional buildings since that date are not required to be rebuilt in conformity with said sections.

As stated in the foregoing opinion, among others, Section 49-38 is by Chapter 90 made applicable to existing buildings and the Fire Prevention Bureau may compel compliance with these regulations by owners of existing buildings, as well as those hereafter erected.

STORAGE PROVISION

(No. 10853—Commissioner of Buildings—M. H. F.—August 3, 1945.)

The term "Storage for sale" as used in the Municipal Code is applicable to retail establishments storing merchandise for sale as well as to manufacturing and general storage establishments.

Citation: Municipal Code, 61-13.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 24, 1945 requests our opinion as to the meaning of the term "the storage for sale" as used in section 61-13 of the Municipal Code of Chicago. Specifically you ask whether the term includes retail stores, such as department, furniture, clothing, grocery stores, etc.

Section 61-13 is one of the provisions of Chapter 61, entitled "General Construction Provisions." The chapter is a component of Part V of the code relating to buildings. Furthermore, Section 61-13 is found within a subdivision of Chapter 61 entitled "Placard Indicating Floor Strength." This section reads as follows:

"It shall be the duty of the owner, his agent, the occupant, or person in possession, charge or control of every building, now in existence or hereafter erected, which is or shall be designed, erected, altered or used for the purposes of the storage for sale, storage or manufacture of merchandise or for the purposes of a class 1 garage or of a stable or hangar having a ground area of more than eight hundred square feet, to affix and display conspicuously on each floor of such building, a placard stating the uniformly distributed load per square foot of floor space, which may be safely applied as provided by the building provisions of this code and there shall be placards displayed to indicate the safe loading of each varying part of such floor. It shall be unlawful to load any floor, or any part thereof, to a greater extent than the loads indicated upon such placards."

From its wording and context it is assumed that the section was designed for the purpose of requiring, in the interest of public safety, the posting of signs to indicate the safe loading of floors according to their structural strength. It seems obvious that when enacting the ordinance the City Council intended to place upon the owner, his agent, the occupant, or person in possession, charge or control of every building which is or shall be designed, erected, altered or used for the purposes of the storage or manufacture of merchandise to comply with the requirements of the section, and to provide for the posting of placards in all buildings where merchandise is manufactured or stored. While we have no way of definitely determining what was the full intent and meaning of the municipal legislative body our best thought is that the words "storage for sale" were used to clearly indicate that not only warehouses where merchandise is stored but establishments where merchandise is stored or held for sale should comply with the requirements to affix and display placards indicating the capacity of the floor load.

As no exception is made so as to remove retail stores from the requirements of the section our opinion is that the terms are applicable to retail establishments storing merchandise for sale as well as to manufacturing and general merchandise storage establishments. If you be-

lieve that it should not be applied to retail establishments or small stores storing and handling merchandise of relatively little weight it is believed that you should suggest to the City Council such amendment as you in your technical knowledge of the matter would deem advisable.

BUILDING CODE TERMS

(No. 10857—Commissioner of Buildings—A. F. G.—August 28, 1945.)

For the purpose of determining the height of ceilings in public assembly units as provided in the Municipal Code, the terms "mezzanine" and "balcony" are synonymous.

Citation: Municipal Code, 40-1, 53-25, 55-15.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of July 31, 1945, which is as follows:

"Your opinion is requested as to whether the term 'balcony' is synonymous with the term 'mezzanine' as used in Section 55-15 of the Municipal Code of Chicago.

Whereas a definition of 'mezzanine' is found in the code as applied to public assembly units, there is no definition of a 'balcony.'

It is therefore necessary for us to determine whether or not the same restrictions that apply to a 'mezzanine' applied to a 'balcony.'

A definition of "mezzanine" is found in Section 40-1 of Chapter 40 Building Definitions and Building Classifications, but there is no definition of "balcony" in that chapter. In Chapter 53 Theaters, both terms are defined, the definition of each being identical except that "balcony" is defined as a "a partial floor seating level superimposed above the main floor or a mezzanine or another balcony in the auditorium and having more than ten rows of seats extending across the auditorium," while a "mezzanine" is defined as a similar seating level "having not more than ten rows of seats extending across the auditorium.

Section 53-25 which provides for height of ceilings in theaters has this provision:

"* * * The auditorium in every theater shall have a clear ceiling height of not less than twelve feet; provided, however, that the average clear ceiling height beneath or above any mezzanine or balcony shall be not less than ten feet; * * *

Webster defines a "mezzanine" as "a low story between two higher ones, especially one between the ground floor and the story above." And defines a "balcony" as "an interior projecting gallery in a public building, as in a theater, specifically such a gallery immediately above the main floor."

In view of the provision in Section 53-25 quoted above, which makes no distinction between "mezzanines" and "balconies" in the matter of

ceiling heights above or below such levels, we are of the opinion that, for the purpose of determining the height of ceilings in public assembly units as provided in Section 55-15, you may properly regard the terms "mezzanine" and "balcony" as synonymous.

LIABILITY OF PUBLIC OFFICERS

(No. 10859—Commissioner of Buildings—F. P. C.—September 7, 1945.)

The amendment to the Cities and Villages Act making the municipality liable for any injury occasioned by the wrongful removal or destruction of any building by a municipality does not relieve the Commissioner of Buildings from personal liability for the wrongful removal or destruction of a building.

Citations:

Statute: Senate Bill No. 205, Ch. 24, Sec. 1-16. Sec. 23-98 (Revised Cities and Villages Act).

Ordinance: Municipal Code, 13-12.

Cases: 237 Ill. 300.

251 Ill. 54.

13 Ill. App. 520.

109 Ill. App. 430.

43 N. E. 476 (Ind.).

Other references: McQuillan Mun. Corp., Sec. 556.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter dated July 10, 1945, in which you state that it is your understanding that the above bill has been passed and is now in effect: that said bill amends the Cities and Villages Act to make the municipality liable for any injury occasioned by actionable wrong to property by the removal and destruction of any building by any municipal officer.

You request our opinion as to whether the bill as presently in effect is such as to relieve the Commissioner of Buildings from personal liability and damages for *his* ordering a building demolished which in *his opinion*, after exercising good faith and reasonable care, is unsafe and a danger to the public.

Your understanding that the above bill is now in effect is correct inasmuch as it was passed by the Senate April 5, 1945, by the House April 25, 1945 and approved by the Governor May 3, 1945. Since it contained no emergency clause, it became law July 1, 1945.

S. B. No. 205 adds Section 1-16 to the Revised Cities and Villages Act. If this section was intended to relieve city officers from liability for the destruction of property deemed to be a public nuisance the language employed by this legislation does not so indicate. Before the passage of this law the municipality was liable for any injury occasioned by actionable wrong in ordering the destruction of any property which the City Council determined to be unsafe or unsanitary but which in fact was not a public

nuisance. (*Sings v. City of Joliet*, (1908) 237 Ill. 300.) It must be assumed that the purpose of Section 1-16 was to render the municipality liable in circumstances when it was not liable under the common law, as in cases when an officer of the City exercised his own discretion in applying a general law making it his duty to remove, destroy or vacate unsafe or unsanitary buildings.

Churchill v. Fewkes, 13 Ill. App. 520 (1883).

People v. May, 251 Ill. 54 (1911).

Summers v. People, 109 Ill. App. 430 (1903).

Such a statute does not by implication absolve officers from personal liability for arbitrary or unreasonable exercise of a delegated discretion. (McQuillan Municipal Corporations, Section 556.) It does not relieve officers from liability for removing, destroying or vacating property which is not in fact a public nuisance. In such cases both the officer and the municipality are liable under Section 1-16 of the Revised Cities and Villages Act.

To transfer a common law liability of municipal officers to the municipality the legislation required is not merely to make the municipality liable for the wrongful and negligent acts of its officers but also to expressly relieve the officers from liability therefor. However, it is our opinion that without regard to the statutory provision in question the Commissioner of Buildings is not liable for any mistake of judgment in the performance of the duties imposed on him when he acts in good faith and with reasonable care.

Churchill v. Fewkes, *Supra*.

People v. May, *Supra*.

Summers v. People, *Supra*.

Your attention is directed to Section 13-12 of the Municipal Code of Chicago whereby the City of Chicago has assumed responsibility for any action taken by the Commissioner of Buildings to enforce the provisions of the code and the Commissioner of Buildings is relieved from all personal liability for any damage that may occur to persons or property as the result of any such act committed in good faith in the discharge of his duties. It is our opinion that by Section 13-12 the City has agreed to indemnify the Commissioner of Buildings and to defend him in any suit brought against him arising from such act. The passage of this ordinance which makes provision in regard to the relation between the City and its officers was within the scope of the power of the City Council. (Section 23-98, Revised Cities and Villages Act.) The ordinance is binding upon the City of Chicago and, in our opinion, provides additional security to the Commissioner of Buildings against personal liability for any action taken by him while exercising good faith and reasonable care.

It may interest you to know that in the case of *Vaughtman v. Town of Waterloo*, 43 Northeastern 476 (1896) the Appellate Court of Indiana held that a city could not by ordinance indemnify a police officer for damages resulting from false imprisonment because the city could not assume liability where none existed in the first instance. The case is, however, distinguishable from the above since in your situation there is a statute which imposes liability on the city.

MOVING BUILDINGS

(No. 10861—Commissioner of Buildings—A. F. G.—October 6, 1945.)

A frame building may be moved from a point outside the fire limits to another location also outside the fire limits. Such building however must conform to the code at its new location. In no case may a frame building be moved into the fire limits.

Citation: Municipal Code, 43-17, 60-5.

OPINION OF FOREGOING SYNOPSIS

Your letter of October 2, 1945, requesting an interpretation of Sections 43-17 and 60-5 of the Municipal Code of Chicago has been received.

The pertinent sections are as follows:

"43-17. No person shall be permitted to move any building which has been damaged to an extent greater than fifty per cent of its value by fire, decay, or otherwise; nor shall it be permissible to move any frame building of such character as is prohibited to be constructed within the fire limits from any point outside the fire limits to any point within the fire limits; nor shall it be permissible to move any building to a location at which the uses for which such building is designed are prohibited by this code. Permits for the moving of frame buildings, other than those the moving of which is herein prohibited shall be granted upon the payment of a fee of ten cents for each one thousand cubic feet of volume, or fractional part thereof of such building, and upon securing and filing the written consent of two-thirds of the property owners according to frontage on both sides of the street in the block in which such building is to be moved. No permit shall be issued to move any building used or designed to be used for purposes for which frontage consents are required until frontage consents in the block to which such building is to be moved have also been secured and filed as required by the provisions of this code relating to such use.

No building used for residence or multiple dwelling purposes shall be moved from one lot to another or from one location to another upon the same lot unless the space to be occupied on such lot shall comply with the provisions of chapter 48 of this code."

"60-5. It shall be unlawful for any person to move any building from one location to another, unless the same shall be altered or reconstructed so as to conform to the provisions of this code governing the construction of such building in its new location at the time of moving the same."

Section 43-17 quoted above prohibits the moving of any frame building not permitted to be constructed in the fire limits from any point outside the fire limits, to any point within the fire limits. The section does not expressly prohibit the moving of a frame building from a point outside the fire limits to another point also outside the fire limits. The second sentence of the said section is as follows: "Permits for the moving of frame buildings, *other than those the moving of which is herein prohibited, shall be granted, etc.*" The only buildings which are prohibited from being moved under this section are: a building damaged to an extent greater than fifty per cent of its value by fire, decay, or otherwise and a frame building from without the fire limits to a location within the fire limits.

If it were the intention of the city council to prohibit the moving of any frame building, it would not have limited such removal to frame buildings from without the fire limits to points within the fire limits as is provided in this section. There is a familiar rule of construction of statutes and ordinances which is; that the enumeration of certain specific things excludes all others. We think that rule is applicable here. This section expressly enumerates the kind of buildings that may not be moved. Under that rule any building not expressly enumerated in this class of buildings would be excluded.

We do not believe that section 60-5 quoted above is inconsistent with section 43-17. That section merely provides that when a building is moved it shall be reconstructed as its new location in conformity with the provisions of the code governing the construction of such buildings at the time of its removal; such as the requirement that a single family frame building shall not be nearer than three feet to the property dividing lot lines and similar provisions.

It is our opinion therefore that a frame building may be moved from a point outside the fire limits to another location also outside the fire limits, but such building must be made to comply with provisions of the code governing the construction of such building at its new location at the time of its removal, and also must comply with the Zoning requirements applicable at the location to which the building is moved.

RETROACTIVE ORDINANCE

(No. 10903—Chairman, Subcommittee on Building Code Revision—
A. F. G.—July 9, 1946.)

When the City Council determines the necessity for additional means of protection, it has the authority to enact ordinances for that purpose and make them applicable to existing buildings, if such ordinances are reasonable and tend in some degree toward the accomplishment of these objects.

Citations:

Cases: 266 Ill. 267.
131 Ill. App. 1.
159 Ill. App. 20.
20 Wash. 468.

Other Reference: 14 Op. Corp. Coun. 437.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of July 2, 1946, in which you request an "opinion as to whether, and to what extent, the city council can pass and enforce ordinances which are retroactive in their application to require that changes be made in existing buildings to bring them into compliance with modern standards of safety."

In an opinion to the fire commissioner dated November 20, 1925, re power of city to require existing theaters to install automatic sprinkler systems, we said:

"Pursuant to your request for an amendatory ordinance requiring all theatres to install automatic sprinkler systems, we transmit herewith an ordinance amending Sections 1291, 1292 and 1295 which, when passed and approved, will include Class IVb and Class V buildings regardless of the date of erection.

We find authority in passing this ordinance, which is retroactive in character, in the case of *Clarke v. City of Chicago*, 159 Ill. App. 20, wherein the court said:

'If the city council from observation or experience determined that certain provisions relating to the construction and operation of a theatre were necessary for the protection of persons attending such theatre, it would be as important for their safety to apply such provisions to theatres already built as to those to be built thereafter.'

Our Supreme Court, in the case of *Williams v. City of Chicago*, 266 Ill. 267, confirmed the view taken by the Appellate Court in the *Clarke* case, and sustained the City in requiring owners of buildings theretofore erected to comply with subsequent reasonable requirements imposed by ordinance.

Because these decisions are so squarely in point on the question you raise, we are of the opinion that the attached ordinances are legally sound and therefore, if passed, would constitute a valid enactment." (Opinions of the Corporation Counsel, Vol. 14, p. 437.)

In the *Clarke* case *supra* the court cited with approval *Seattle v. Hinckley*, 20 Wash. 468, 82 Pac. 747, 2 L. R. A. (N. S.) 298. In this case a fire escape had been constructed in compliance with the ordinance then in force. An ordinance was thereafter passed requiring different fire escapes to be provided, the owner contending the ordinance deprived him of his existing rights. In its opinion the court said:

"There is no merit in the contention that the respondent had any inherent or vested right because he had complied with the law existing at the time he built. There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community. But to be protected against such impairment or imperilment is the universally recognized right of the community in all civilized governments—a protection which the government not only has a right to vouchsafe to the citizens, but which it is its duty to extend in the exercise of its police power. * * * It would be a sad commentary on the law if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases simply because the confessedly faulty method in use was the method provided by law at the time of its construction."

In the *Williams* case cited above, an ordinance of the City of Chicago required the installation of certain fire apparatus in existing and new apartment buildings. After holding the city had ample power to pass the ordinance as a safeguard or protection to the public health, safety and welfare if the regulation was a reasonable one, the court said:

"We are also of opinion the fact that plaintiffs in error's buildings had been constructed under permits from the city and in accordance with the then existing ordinances is no valid objection to this ordinance. All rights are subject to the police power of the State, and a citizen cannot acquire a vested right of exemption from a proper and reasonable exercise of that power for the public health, safety or welfare."

The general doctrine governing the above cases unquestionably is that, under its police powers, a municipal corporation may pass ordinances providing for the public health and safety, and this supervision of the public health and safety is a governmental power which is continuing in its nature and may be dealt with as the special exigencies of the moment may require.

However, this does not mean that the city council may unreasonably require a building erected in conformity with the requirements of the city at the time it was built to be completely reconstructed, at great cost to the owner, unless such reconstruction is determined to be necessary for the public safety and welfare, which determination is always subject to review by the courts.

In *Masonic Fraternity Temple Association v. City of Chicago*, 131 Ill. App. 1 (1907) an ordinance passed after the erection of a fireproof building would have required the practical reconstruction of the building. The court in enjoining the enforcement of the ordinance as unreasonable said:

"We can easily conceive of circumstances and changes in physical, social or municipal conditions which might so require, to a certain extent, and in reasonable degree, in the case of buildings already constructed, alteration or addition, as to make the compelling of such alteration or addition a matter falling within the police power. We do not wish to hamper or prevent such action by an unavoidable and unnecessary general limitation of the police power. Each case of its attempted exercise in a new direction must stand or fall by its own circumstances. But certain limitations of it are plain. The exercise of the police power, when it interferes with private property, in the interest of the public welfare or public safety must at least be reasonable."

It is our opinion, therefore, that when the city council determines the necessity for additional means of protection, it has the authority to enact ordinances for that purpose and make them applicable to existing building, if such ordinances are reasonable and tend in some degree toward the accomplishment of those objects.

ESCALATORS

(No. 10909—Commissioner of Buildings—A. F. G.—September 4, 1946.)

The section in the Building Code providing that: "an escalator serving a basement or a sub-basement area shall be at least one hundred feet distant from any escalator serving floors above the main exit level", applies only to escalators used in lieu of required stairways.

Citations:

Ordinances: Municipal Code—64-58.

Case: 320 Ill. 507.

OPINION OF FOREGOING SYNOPSIS

Your letter of August 15, 1946 is as follows:

"Your interpretation of the Provision of Section 64-58 is required.

The last sentence of this Section states that 'An escalator serving a basement or sub-basement area shall be at least one hundred feet distant from any escalator serving floors above the main exit level.'

The question arises as to whether this refers only to escalators used in lieu of stairways and being required means of exit, or whether this provision obtains for all escalator installations."

Section 64-58 reads as follows:

"An escalator moving in the direction toward the main exit level and meeting the requirements of chapter 79 of this code may be used in lieu of an equal width of required stairway, and may be substituted for one out of four required stairways. Such escalators shall be inclosed as required for the stairways displaced thereby. An escalator serving a basement or sub-basement area shall be at least one hundred feet distant from any escalator serving floors above the main exit level."

The heading of this section is "Escalators in lieu of stairways." While the heading of an ordinance is not part of the ordinance the placing of the said heading before section 64-58 indicated the intention of the city council that the subject matter of the section was to apply to escalators used in lieu of required stairways.

In construing statutes and ordinances the primary rule is to ascertain and give effect to the intention of the law making body. In the construction of a statute courts are not confined to the literal meaning of words used, but when the intention can be ascertained from the language, words may be altered, modified or restricted which do not violate the clear purpose of the statute. *Furlong v. South Park Commissioners*, 320 Ill. 507 (1926).

This section, as its heading indicates, deals with escalators used in lieu of required stairways, and while the last sentence literally construed could apply to any escalator, in harmony with the apparent intention of the city council we construe the last sentence as if it read: "Such an escalator, etc." or "An escalator in lieu of the required stairway, etc."

It is our opinion that the last sentence of section 64-58 applies only to escalators used in lieu of required stairways.

BOWLING ALLEY PARKING LOT

(No. 10915—Building Commissioner—A. F. G.—September 27, 1946.)

When the City Council adopted the ordinance granting the variation for a bowling alley as a permitted use in a commercial district, it included authority to use the parking lot which is under the said section an essential part of the bowling alley.

Citation:

Ordinance: Coun. J. p. 6073, July 11, 1946.

OPINION OF FOREGOING SYNOPSIS

We have your letter of September 27, 1946, which is as follows:

"An interpretation of the zoning provisions of the Municipal Code is requested as it pertains to Section 11 wherein under provision 3, a permitted use in a commercial district is in part 'bowling alley, convention hall, dance hall, gymnasium or similar place of amusement or entertainment, provided that where there are more than 10,000 square feet of area of the public rooms in the building in which the facilities for this use are located, a public garage or parking lot for the storage of one passenger automobile for each 200 square feet of such area is erected or established and maintained in the block in which the same is located, or in the block directly opposite thereto.'

Under the definitions 'special use' is defined in part as a parking lot. Section 24 requires the Board of Appeals shall approve any special use of any lot area or building within any use district if, after a public hearing pursuant to notice as provided by the laws of this state, in cases of variations it is determined that the special use is necessary at that location for public convenience.

An applicant for the construction of a bowling alley has conveyed this application with a plat indicating the intended use of the property immediately to the west in the same block, zoned for commercial use, as a parking area to fulfill the requirements of the permissible use of the bowling alley at the corner referred to.

Question arises as to whether this use of the premises for parking lot area is considered a special use and within the terms of the zoning provisions of the code and as such, require approval of the Board of Zoning Appeals before being acceptable for the issuance of a permit by this department."

The third paragraph of Section 11 (2) of the Chicago Zoning Ordinance is correctly quoted in your letter. In this case, the owners of the property, which is in a B district, made application for a variation to permit the use of the premises for a bowling alley, a C use. A public hearing was had on this application and before the Zoning Board of Appeals would act on the application required the applicant to furnish satisfactory proof that he had acquired the parking facilities required by the foregoing section. Proof satisfactory to the board having been produced, the board granted the variation and recommended to the city council the passage of an ordinance granting the variation, which ordinance, passed July 11, 1946, Coun. J. p. 6073, directed the commissioner of buildings to issue the necessary permits for the erection of the bowling alley "on condition that adequate parking facilities as provided by the ordinance shall be provided."

The parking facilities provided in Section 11 is an auxiliary use expressly permitted in a C district and is distinguished from a "parking lot" as a special use.

It is our opinion that when the city council adopted the ordinance granting the variation for the bowling alley, it included authority to use the parking lot which is under the said section an essential part of a bowling alley.

We are of the opinion, therefore, that you should approve the application for the use of the parking facilities.

AIRPORT HANGARS

(No. 10917—Building Commissioner—A. F. G.—October 11, 1946.)

The installation of hot air heating apparatus in hangars is not prohibited by the Municipal Code, as it is in buildings used for garage purposes.

Citations:

Ordinance: Municipal Code Secs. 52-16, 52-38, 52-39, 58-11, 61-62.

Case: 321 Ill. 552.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 7, 1946, which is as follows:

"Your interpretation of Section 58-11 of the building provisions of the Municipal Code is requested. This section reads as follows:

'Every heating plant and its fuel storage in a hangar shall be completely separated from all hangar uses in the building in which it is located by two-hour fire resistive construction. Entrance to such heating plant shall be from the outside only.'

Question arises as to how the heating, piping or ducts may transfer the heat from the heating plant to the hangar proper if this requirement is adhered to. It is presumed that no openings may be in this two-hour fire resistive separation.

Sections 52-38 and 52-39, referring to garages, has a somewhat similar restriction phrased differently. If the phraseology of Sections 52-38 and 52-39, applying to garages, can be read into Section 58-11 it might be interpreted that steam or hot water types of heating could permit the pipes thereof to pass through the fire separation wall, but hot air ducts served by a furnace system could not pass through said separation.

In view of the fact that an application for the construction of a hangar at the Chicago Municipal Airport is held up pending determination as to how necessary heating facilities can be provided for in said hangar, your opinion as to the proper interpretation of this provision is urged."

Section 58-11 of the code re heating plants in hangars is correctly quoted above in your letter.

Sections 52-38 and 52-39 refer to heating equipment in garages and are as follows:

"52-38. Permitted heating systems.) Except as hereinafter provided, garage heating shall be by means of radiation or connection from hot water, vapor, or steam heating systems of which the boilers or devices containing combustion chambers and the fuel storage spaces shall be separated from every garage space as required by section 52-16.

"52-39. Prohibited heating systems.) No stove, hot air furnace, or similar device containing a combustion chamber shall be installed in any garage, and no system of air circulation shall be permitted to penetrate any required fire-resistive separation or inclosure."

Section 52-16 also refers to garages and is as follows:

"52-16. Separation from heating plants.) Every heating plant and its fuel storage, except for class 2 garages attached to single dwellings, shall be separated from all garage space by standard fire division walls and standard fire separations. Communication, if any, between any garage space and a heating plant or fuel storage space shall be through a vestibule as provided by this chapter for communicating vestibules in multiple use buildings. There shall be no communication inside the building between any class 1 garage space and any space containing a heating plant having a combustion chamber."

It is apparent from a study of the foregoing provisions that the city council in enacting these provisions considered garages from the standpoint of fire prevention in a different class from hangars. In the first place section 58-11 only requires the separation between the heating plant in a hangar and the hangar uses in the building to be of two hour fire-resistive construction, which may be a four inch brick wall. Section 52-16 requires the separation between the heating plant and all garage space in a garage to be by standard fire division walls, which by section 61-62 is required to be a twelve inch masonry wall or its equivalent.

Only certain types of heating apparatus are permitted in a garage building and they must be separated from the garage space by standard fire division walls. No stove, hot air furnace, or similar device may be installed in a garage and *no system of air circulation is permitted to penetrate any fire-resistive separation*. There is no such limitation provided in section 58-11 concerning the type of heating apparatus in hangars, nor is any type of heating pipe prohibited from penetrating the fire-resistive separation. If such prohibition were intended, language similar to that used in section 52-39 would have been employed to express that intention.

We do not believe, as you suggest, that the sections quoted above relating to the separation of heating plants in garages should be read into section 58-11 relating to the same subject in hangars, for the reason that the council has imposed requirements and prohibitions in garages which plainly it did not intend to extend to heating plants in hangars.

In prohibiting only hot air ducts from penetrating any fire-resistive separations in garages, we believe that the council intended by implication to permit steam, hot water or other type of pipes carrying heat to pass through the fire-resistive separation under the maxim, "The inclusion of one is the exclusion of another."

In hangars, under section 58-11, no type of pipe carrying heat from the heating apparatus is expressly prohibited from penetrating the separation, as is the case in section 52-39, and a reasonable construction of this section is that no such prohibition was intended. Ordinances as well as statutes must be reasonable and when heating plants are permitted in certain parts of hangars for the purpose of heating the hangar, it would be absurd to hold that the heat generated in such plant may not be carried by pipes or ducts into the hangar for the purpose intended. Where two constructions may be placed on a statute, one reasonable and wholesome, the other leading to absurdity, the former will be adopted. *People v. Day*, 321 Ill. 552 (1926).

It is our opinion, therefore, that as the installation of hot air heating apparatus or the penetration of the separation by air ducts are not expressly or impliedly prohibited by section 58-11 the applicant is entitled to a permit to make such installations.

BUILDING CODE—PRE-EXISTING BUILDING

(No. 10926—*Fire Prevention Bureau—F. T. M.—November 13, 1946.*)

All rights are subject to the police power of the State and a citizen cannot acquire a vested right of exemption from a proper and reasonable exercise of that power for the public health, safety or welfare. The Fire Prevention Bureau may compel the observance of building code provisions by owners of buildings existing prior to enactment of the provisions in question as well as to those thereafter exacted.

Citations:

Ordinance: Municipal Code, 40-2, 40-6, 50-1, 50-50, 60.

Cases: 266 Ill. 267.

289 Ill. 206.

159 Ill. App. 20.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 10, 1946, requesting an opinion as to the proper interpretation of Section 50-50 of the Chicago Municipal Code. It is stated that your division notified certain building owners, to comply with Section 50-50 in the building, being a one story and basement building, occupied by a retail store for the storage and sale of merchandise. There was attached to your communication a letter from their attorneys, questioning the authority of your department to require the installation of an approved system of automatic sprinklers in the basement of the store. Their letter further states that Section 50-50 does not apply to a building erected, or to a basement, used as a department store, prior to the enactment of said section. It is further stated in their letter that this building has been used as a department store since 1907, with approximately two-thirds of the basement area having been so used since 1907, and the entire area of the basement since 1923.

Section 50-50 of the Municipal Code of Chicago, enacted August 30, 1939, reads as follows:

"A standard system of automatic sprinklers meeting the requirements of Chapter 91 of this Code shall be provided in every room used for the storage or baling of waste paper in every business unit; for every space used as a carpenter or paint shop, or storeroom for lumber or furniture in an office or financial unit; and, for all basement spaces in any department store and throughout all department stores two stories or more in height * * *."

The question presented is whether Section 50-50 applies to a building erected and existing prior to the enactment of said section. The following sections of the Municipal Code are pertinent:

"50-1. A business unit shall, for the purpose of this Chapter, be defined as provided in Section 40-6 of this Code."

"40-6. A business unit is hereby defined as any building or part of a building, designed, intended, or used as an office unit, a financial unit, a sales unit, a storage unit, or a manufacturing unit."

"40-2. All buildings and structures existing at the time of the enactment of this Code, or hereafter designed, erected, altered or con-

verted, shall be classified according to occupancy and use in accordance with the building provisions of this Code. Any requirements for buildings not herein classified shall be determined by the Commissioner of Buildings subject to arbitration as provided in this Code."

The building in question by reason of its use and occupancy is defined as a business unit, and became subject to the requirements set forth in Chapter 50, Sections 1 to 50 inclusive. That Chapter 50 was intended to apply to existing buildings is evidenced in Section 40-6, and by reference Section 50-1, by the words "any building or part of a building, designed, intended or used." Nearly all of the other chapters pertaining to the various classifications under the Code begin with a sentence substantially as follows:

"Every building or part thereof *hereafter* designed, erected, altered or converted or used as * * * building,"

and which shows the intention of the City Council to limit the provisions of these chapters to buildings subsequently erected, altered. There is no such limitation in Chapter 50 limiting the requirements thereof to buildings erected subsequent to passage.

However, certain requirements in Chapter 50, relating to structure and construction, do not apply to existing buildings by reason of Chapter 60 entitled "Existing Buildings and Structures," which defines an existing building as a building in existence on July 6, 1938. Chapter 60 provides that any work of construction under a permit issued by the building department prior to that date may be completed and the building thus constructed shall be designated an existing building. By this chapter the Council intended that such buildings may be repaired with the materials and in the form provided by the ordinance in effect at the time of their erection and shall not be required to comply with the new Code unless the building is enlarged or converted to a hazardous use. It will be observed that while Section 60 exempts existing buildings from compliance with the Code provision regarding construction and alteration, it does not grant an exemption from other provisions and requirements.

Section 50-50 to 50-52, inclusive, entitled "Fire Protection" are by Chapter 90 made applicable to existing buildings. Sections 90-2 and 90-3 read as follows:

"90-2. All buildings and structures now existing or hereafter erected, altered or enlarged, shall be classified for the purposes of the fire regulations of this Code according to occupancy, use and type of construction in accordance with the building provisions of this Code."

"90-3. It shall be unlawful to continue the use or occupancy of any building structure or place which does not comply with those provisions of the Code which are intended to prevent a disastrous fire or loss of life in case of fire, until the changes, alterations, repairs or requirements found necessary to place the building in a safe condition, shall have been made."

An ordinance similar in character to that of Section 50-50 was sustained in the case of *Clarke v. City of Chicago*, 159 Ill. App. 20 (1910), wherein the court said:

"If the City Council from observation or experience determined that certain provisions relating to the construction and operation of a theatre were necessary for the protection of persons attending such theatre, it would be as important for their safety to apply such provisions to theatres already built as to those to be built thereafter."

Our Supreme Court in the case of *Williams v. City of Chicago*, 266 Ill. 267, (1915), confirmed the view taken by the Appellate Court in the *Clarke* case, and held that apartment houses or flat buildings constructed under a permit from the City and in accordance with the ordinances then in force does not exempt the owners from compliance with subsequent reasonable requirements imposed by ordinance as to equipping buildings with fire apparatus.

Our Supreme Court in the case of *City of Chicago v. Washingtonian Home*, 289 Ill. 206, (1919), sustained an ordinance requiring owners of certain buildings to install automatic sprinkler systems.

The general doctrine governing the above cases is that all rights are subject to the police power of the State, and a citizen cannot acquire a vested right of exemption from a proper and reasonable exercise of that power for the public health, safety or welfare.

It is our opinion, therefore, that your Bureau may compel the observance of the provisions of Section 50-50 by owners of buildings existing prior to enactment as well as to those thereafter erected.

"TENEMENT HOUSE"

(No. 10934—Commissioner of Buildings—F. T. M.—January 17, 1947.)

The term "tenement house" as used in the Municipal Code is not synonymous with the term "multiple dwelling" but applies only to specific type of multiple dwellings namely, flat or apartment houses and apartment hotels used or intended to be used as a home or residence for two or more families.

Citations:

Ordinances: Municipal Code, 40-4, 145-21.

Cases: 73 N.E. 241.

Other reference: 18 Op. Corp. Coun. 530.

OPINION OF FOREGOING SYNOPSIS

This department is in receipt of your letter of January 7, 1947, requesting an opinion as to whether the term "tenement house" as used in Section 145-21 is synonymous with the term "multiple dwelling", or whether it applies to some specific type of multiple dwellings, as defined in Section 40-4.

Section 145-21 of the Municipal Code of Chicago provides in part that "no new laundry shall hereafter be established in any tenement house situated in the city." Section 40-4 defines a multiple dwelling as follows:

"40-4. A multiple dwelling is hereby defined as a building, or part of a building, designed, intended, or used as an apartment house, apartment hotel, tenement house, hotel, rooming house, lodging house, clubhouse with sleeping quarters, convent, monastery, ecclesiastical homes, nurses home, or other use in which there is more than one dwelling."

The term "tenement house" is defined in Webster's Dictionary as follows:

"Tenement House. Commonly, a dwelling house erected or used for the purpose of being rented, esp. one divided into separate apartments, or tenements for families. Often, especially in reference to large cities, such a building occupied as dwellings by the poor classes. * * *

In the law no distinction is made between flat houses, apartment houses, and the poorest class of tenements, popularly called 'tenement houses.' They all have many parts used in common by the different families or occupants, and receive some quasi-public care and supervision. * * *

In the case of *Kitching v. Brown*, 73 N.E. 241 (1905), the court said:

"Legally there is no difference in the United States between an apartment house and any other tenements."

In Vol. 18, Corporation Counsel's Opinions, 530, (1932) this department approved the definition of a "tenement house" being used by the Commissioner of Health, which definition is as follows:

"A tenement house is any tenement, flat or apartment house, which is used or intended to be used as a home or residence for two or more families. A tenement house as defined includes an apartment hotel."

We are of the opinion that the above definition is applicable to the term "tenement house" as used in Section 145-21; that the term "tenement house" is not synonymous with the term "multiple dwelling," but applies only to specific types of multiple dwellings, namely, flat or apartment houses and apartment hotels used or intended to be used as a home or residence for two or more families.

"APERTURE"

(No. 10936—Commissioner of Buildings—A. F. G.—January 23, 1947.)

The term "aperture" as used in the Municipal Code is expressly limited to "windows, skylights, transoms, or auxiliary openings which are provided for ventilating purposes". Doors are not included in the aforementioned classification.

Citation: Municipal Code, 81-4, 81-5, 81-7.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of January 14, 1947, which is as follows:

"Your counsel is requested as to the proper interpretation of the term 'aperture' as appearing in Note No. 6 of Section 81-7 covering ventilation provisions of the Municipal Code.

Whereas Section 81-5 indicates the area of ventilating openings computed in terms of windows, skylights, transoms and auxiliary openings, it has been the practice of the Bureau of Ventilation to assume that door openings may not properly be considered ventilating openings or apertures.

Particularly in respect to loading spaces and appurtenant driveways, as referred to in said Note No. 6, it would appear reasonable and proper that the vehicular entrance doorway should properly be considered qualifying for ventilation purposes."

Section 81-4 of the chapter on Ventilation is as follows:

"Ventilating openings in any room or space are hereby defined as apertures opening upon a public way, yard, court, public park, public waterway, or onto a roof of a building or structure in which the room or space is situated. They shall be windows, skylights, transoms, or auxiliary openings which are provided for ventilating purposes and which are equipped with adjustable louvres, dampers, or other devices to deflect or diffuse the air currents."

Note No. 6 of Section 81-7 reads:

"Note No. 6. Loading spaces and appurtenant driveways.

Loading spaces and appurtenant driveways in manufacturing and storage units having apertures opening directly to atmosphere, said apertures having an area of not less than 20% of the floor area of the loading spaces and appurtenant driveways—Natural ventilation.

If the apertures have an area of less than 20% of the floor area of the loading spaces and appurtenant driveways—E. 5."

Reading this note in connection with Section 81-4 quoted above we must construe the term "apertures" as used in the note as meaning ventilating openings as defined in the foregoing section and which are expressly limited to "windows, skylights, transoms or auxiliary openings which are provided for ventilating purposes." Doors are not included in the class of apertures which are enumerated as ventilating openings and under the rule of construction that the inclusion of certain things excludes all others, we must hold that they are not ventilating openings.

If you are of the opinion that doors are proper for ventilating purposes generally section 81-4 should be amended to include doors as ventilating openings. If you feel that doors as ventilating openings should be limited to "Loading spaces and appurtenant driveways," Note No. 6 should be amended to effect that purpose.

HOTELS AND APARTMENT HOTELS

(No. 10956—Commissioner of Buildings—F. T. M.—April 9, 1947.)

The definition of a hotel includes generally the term "apartment hotel", and further defines a hotel as a place where sleeping or rooming accommodations are furnished for hire or rent, with or without meals in which four or more sleeping rooms are used and maintained for the accommodation of guests, lodgers, or roomers.

Citation: Municipal Code, 40-1, 48-56, 61-21, 64-28.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of March 19, 1947, which referred to the recently enacted amendment to Section 40-1 of the Municipal Code, and requested our opinion as to whether an "apartment hotel" comes within the category of a Class 1 hotel. Our opinion was also requested as to whether other structures included in the group termed "multiple dwellings," such as clubs having sleeping quarters, dormitories, etc., should be included within the amendments to Sections 61-21, 64-28 and 48-56.

Section 40-1 of the Municipal Code defines a hotel as follows:

"A building or structure kept, used, or maintained as, or advertised, or held out to the public to be an inn, family hotel, apartment hotel, lodging house, dormitory, or place where sleeping or rooming accommodations are furnished for hire or rent, whether with or without meals, in which five or more sleeping rooms are used and maintained for the accommodation of guests, lodgers, or roomers."

The amendment to Section 40-1 was an addition to the above definition, providing as follows:

"Every hotel shall be classified as a Class 1 or a Class 2 hotel.

Class 1 Hotel. Class 1 shall include all hotels more than four stories and basement in height and all hotels more than two stories and basement in height with sleeping accommodations for more than twenty-five persons above the second story.

Class 2. Hotel. Class 2 shall include all other hotels."

Therefore, an apartment hotel is a Class 1 hotel when it is four stories and basement in height or more than two stories and basement in height with sleeping accommodations for more than twenty-five persons above the second story. Any structure coming within the provisions as defined by Section 40-1, including a building held out to the public to be an apartment hotel, would be a Class 1 hotel or Class 2 hotel, classification being dependent upon height or sleeping accommodations.

Your letter makes reference to "so called" apartment hotels. The term "apartment hotel" is merely descriptive of the character of the hotel. When the question arises as to whether a building is maintained as an apartment hotel, the test to be employed is whether the control exercised by the management and the services performed are similar in character to that of hotel operation. The ordinary hotel provides maid, telephone switchboard and elevator services, with clerks and attendants for the convenience of its guests. It, therefore, follows that when these services or some of them are provided in the operation of a furnished apartment building, no distinction exists between it and a hotel except for the size or possible use of the suites. Maid service permits entry into each suite by the management and the exercise of this control is sufficient to place a building so serviced within the hotel classification. The fact that rooms or suites are available to transients would lead to the same conclusion. The definition of a hotel includes generally the term "apartment hotel" but further defines a hotel as a place where sleeping or rooming accommodations are furnished for hire or rent, whether with or without meals, in which four or more sleeping rooms are used and maintained for the accommodation of guests, lodgers, or roomers.

It is also our opinion that buildings having dormitories and clubs with sleeping quarters for hire are subject to the amendments to Sections 61-21, 64-28 and 48-56, when such buildings fall within the classification of a Class 1 hotel.

WORD "PERSON"

(No. 10957—*Commissioner of Buildings—F. T. M.—April 10, 1947.*)

The word "person" as used in the Building Code refers not only to individuals but also to any organization as described in the code,

Citation: Municipal Code, 50-15 to 50-19 incl.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter dated April 8, 1947, requesting an interpretation of the terminology appearing in Sections 50-15 to 50-19, inclusive, of the Chicago Municipal Code, wherein the word "person" is used. The question presented is whether the word "person" refers to an individual or to a single venture or occupancy.

Section 50-15 reads as follows:

"50-15. Any building of fireproof construction which is used for storage or manufacturing purposes and not over two stories in height may have undivided fire areas of any area, *if occupied by not more than one person.*"

Section 1-9 (e) which defines the word "person" reads in part as follows:

"Person. Any natural individual, firm, trust, partnership, association, or corporation in his or its own capacity * * *."

Therefore the word "person" as used in the Municipal Code refers not only to individuals but also to any organization as described in the above section of the Municipal Code.

FIRE AND BUILDING DEPARTMENT JURISDICTION

(No. 10958—*Fire Prevention Bureau—A. F. G.—April 17, 1947.*)

In the division of jurisdiction between the fire department and building department, the City Council intended that the supervision of all structural requirements in buildings; and the installation of all fire protection devices, for the protection of buildings from fire should be in the Building Commissioner. They also intended that after the erection of buildings and the installation of fire protection devices, the fire prevention bureau should make periodical inspections of such devices; have supervision over the condition in which buildings are maintained—particularly with reference to conditions which relate to the safety of life and property from fire—to see that means of exit are not obstructed; to prevent conditions which would impede the fire

department in combating fires, and generally to see that buildings are kept in a safe condition and free from all possible hazards from fire.

Citations:

Ordinances: Municipal Code, Secs. 1-9, 12-20, 12-24, 43-4, 51, 90-47 to 90-63, 101-29, 129, 172.

OPINION OF FOREGOING SYNOPSIS

We have your letter of November 21, 1946, which is as follows:

"The Bureau of Fire Prevention is in serious doubt as to its jurisdiction and authority regarding numerous chapters of the Municipal Code. This uncertainty vitally concerns all work involving the scope of our inspection notices, the approval of building plans and license applications and the prosecution of court cases.

By citing a specific case, it is not possible to give you the full picture of the entire problem involved. However, it might be well to call your attention to Section 101-29, Section 1-9 and Chapter 51 of the Municipal Code.

Section 101-29 requires the approval by the Division Marshal in Charge of Fire Prevention, and by no other department or bureau head, before a license shall be issued for a hazardous use unit. The regulations pertaining to hazardous units are set forth in Chapter 51. It appears that Section 1-9 places full authority over Chapter 51 in the Commissioner of Buildings. In other words, the Division Marshal is required to approve licenses of hazardous use units over which he appears to have no jurisdiction.

I would be pleased to have one of your assistants make a study of the Municipal Code with the view of outlining the jurisdiction and authority of the Fire Prevention Bureau."

Section 1-9 of the Municipal Code of Chicago defines the "building provisions" of the code as Chapters 39 to 85 inclusive and Chapter 89, and defines the "fire regulations" as Chapters 90, 91 and 92.

Section 13-11 of the code provides: " * * * It shall be the duty of the commissioner of buildings to administer and enforce the provisions of this code that relate to the erection, construction, alteration, repair, removal and safety of buildings and the use of buildings and premises with the exception of those provisions which by their terms are to be under the direct and immediate supervision of the board of health or of the bureau of fire prevention or of such other departments or offices of the city designated by such code provisions."

Chapter 12 which creates the bureau of fire prevention provides in section 12-20: "Said division fire marshal shall have full power to pass upon any questions arising under the *fire regulations* of this code subject to the conditions, modifications and limitations contained therein."

As shown in Section 1-9 above referred to, the fire regulations are contained in Chapters 90, 91 and 92. Chapters 91 and 92 are chapters that provide specifications for Standard Sprinkler Systems and Standard Inside Standpipe Systems respectively and contain no provision as to where or in which parts of a building these systems are required. The requirements for sprinkler and standpipe systems are covered by various sections of chapters 48 to 57 inclusive of the building provisions of the code.

The other chapter included in the fire regulations of the code is Chapter 90. It contains specifications for Standard Fire Alarm Systems and Standard Fire Extinguishers. The places where this system and equipment are required are found in the building provisions of the code. This chapter in addition has provisions regulating the storage of combustible and flammable materials, lockers for workmen's clothes, the storage of oily rags, waste and rubbish, the storage of acids, pitch and paraffin, and the storage of oils, coal and paints. There are also provisions regulating scenery, drapes, curtains, hangings and decorations, open flame lights and appliances and the posting of building capacity signs and floor plans, the marking of aisles where seats are not permanently fastened. Sections 90-47 to 90-50 provide regulations against locking of exit doors, the obstruction of aisles and exits and for the arrangement of stocks and stores. Sections 90-51 to 90-55 provide regulations for hazardous operation. Sections 90-56 to 90-61 cover the requirement for stage firemen and fire guards in theatres and motion picture houses, and sections 90-62 and 90-63 have reference to smoking in hazardous use units and theaters. All of these provisions have to do with the use of the building after it is erected.

Section 90-4 of the Chapter is as follows:

"90-4. Dangerous buildings a nuisance.) Any building, structure, enclosure, place or premises, perilous to life or property by reason of the construction of such building or structure or by reason of the condition or quantity of its contents, or the use of the building or its contents, or the use of the enclosure or the overcrowding at any time of persons therein, or by reason of deficiencies in such fire alarm or fire prevention equipment, as may be required by the fire regulations of this code, or where conditions exist which would hamper or impede the fire department in combating a fire in or on the building, is hereby declared to be a nuisance and the division marshal in charge of the bureau of fire prevention is empowered and directed to cause any such nuisance to be abated."

Any order or notice of the fire department under the foregoing section is subject to review by a board of survey appointed in the manner provided in Section 90-5.

Section 43-4 of the Chapter dealing with building permits provides that the commissioner of buildings shall submit all drawings and plans submitted to him for permits to various other departments including the fire department, for examination and approval as to such provisions of the code as are within the duty of such department to enforce.

Section 12-24 provides that the building plans covering certain classes of buildings are to be approved by the bureau of fire prevention which shall "pass on all questions relating to the safety of life and property from fire."

These two sections seem to be in conflict. Section 43-4 requires the fire department to approve only as to those provisions which that department is required to enforce, which are the fire regulations of the code included in Sections 90, 91 and 92. Section 12-24 authorizes the fire department to pass on all questions relating to the safety of life and property from fire. All of the provisions for the safety of life and property from fire are found in the building provisions of the code and are to be enforced by the commissioner of buildings. Provisions for fire walls, fire areas, enclosure of stair wells and elevator hatchways, sprinkler systems, inside standpipe systems, standard fire alarm systems, fire extinguishers, the number and location of stairways and fire escapes, the regulation of flammable liquids and hazardous uses are all included in the building provisions and not in the fire regulations of the code.

In the General Licensing Provisions, Chapter 101, section 101-29 requires the approval by the fire prevention bureau of every license to engage in any business classified as a hazardous use in Chapter 51 of the code. Chapters 127, Licensing of Filling Stations; Chapter 129, licensing of certain enumerated Flammable and Hazardous Chemicals; Chapter 129.1, licensing of Flammable Liquids, and Chapter 172, licensing of Fuel Oil Dealers and Fuel Oil Storers, all require the application for license to be approved by the bureau of fire prevention and in some cases jointly with the commissioner of buildings.

Section 101-29 provides that the bureau of fire prevention shall make an inspection of every hazardous use unit for which an application for license has been made and if such inspection shows compliance with the requirements of Chapter 51, the bureau shall issue a certificate of compliance and approval. We believe this approval should be given where the requirements of Chapter 51 are met even though no record of the original permit for tanks can be found.

From the foregoing it would appear that in the division of jurisdiction between the building department and the fire department, the city council intended that the supervision of all structural requirements in buildings; the installation of all fire protection devices, such as sprinkling systems, standpipe systems, fire extinguishers, fire escapes and other requirements provided in the building code for the protection of buildings from fire, should be in the building commissioner, and intended that after the erection of buildings and the installation of fire protecting devices, the fire prevention bureau should make periodical inspections of such devices; have supervision over the condition in which buildings are maintained—particularly with reference to conditions which relate to the safety of life and property from fire—to see that buildings are not overcrowded; that means of exit are not obstructed; to prevent conditions which would impede the fire department in combating fires and generally to see that buildings are kept in a safe condition and free from all possible hazards from fire.

WATER TOWERS

(No. 10967—Building Commissioner—F. T. M.—June 3, 1947.)

Under interpretation of the Building Code regarding Water Towers, providing such towers shall not exceed 60 feet in height, said towers may be erected on the roof of a building or may be independent structures servicing an adjoining building or buildings.

Citation: Municipal Code, Sec 16. (Zoning Ordinance.)

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of May 28, 1947, requesting our interpretation of Section 16 of the Chicago Zoning Ordinance, as amended, which reads as follows:

"In first volume districts chimneys and similar structures above roof shall not exceed 66 feet in height, and in second volume districts shall not exceed 85 feet in height, from the established grade to the lot, but water towers for sprinkler systems may be erected to a height of 60 feet above the height of the roof of the building."

The italicized portion of the section was added by a recent amendment of November 6, 1946 (Coun. J. 6551). You ask whether the section as amended pertains only to water towers for sprinkler systems mounted above the roof of a building, or whether such tower may be an independent structure along the side of the building or buildings being served therefrom.

It is our opinion that such water towers may either be mounted upon the roof of a building, or may be an independent structure servicing an adjoining building or buildings. The height of an independent structure for such purpose is limited by the ordinance to a height of 60 feet above the height of the roof of the building or buildings in which sprinklers are to be provided.

PARCEL DELIVERY STATIONS

(No. 10982—*Commissioner of Buildings—F. T. M.—July 10, 1947.*)

A parcel delivery service depot where small trucks are loaded for outlying deliveries is not a motor freight truck terminal as described in the Zoning Ordinance.

Citation:—Zoning Ordinance, Sec. 12.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of June 27, 1947, requesting our interpretation of that part of Section 12 of the Chicago Zoning Ordinance which permits the use of premises in a manufacturing district for purposes of "railroad, water and motor freight and motor truck freight terminal and warehouse." The question has arisen as to whether to include under the category "motor truck freight terminal" a structure originally erected as a public garage and recently converted to use of a parcel delivery service which receives in larger truckloads prepackaged merchandise from department stores and distributes same to smaller trucks for local deliveries.

We are also in receipt of the analysis and brief pertaining to the operations of a delivery company, who desires to use an existing garage building, for purpose of a garage and for parcel delivery service. The brief alleges that the company is a contract carrier and delivers parcels in the Chicago Metropolitan Area for four downtown department stores; that their contract provides that package size is limited to 3 $\frac{3}{4}$ cu. ft. (18"x18"x18") and 25 pounds weight, being for the most part wearing apparel and that all parcels received be delivered by the end of the next day. It is further stated that the building houses 20 parcel delivery trucks of one ton or less and parcel handling equipment consisting of 32 sets of four shelves each for each truck stall and a canvas conveyor belt drawn by a 3 horsepower motor, which conveyor belt runs down the center of the stall. The garage building has parking stalls for 32 trucks.

The method of operation is described as follows: On each weekday a large trailer truck makes four deliveries of parcels between the hours of 2:30 P. M. and 9:00 P. M. The parcels are then sorted and distributed to shelves in the truck stalls. The delivery operation takes approximately 15 minutes and all sorting is ended by midnight. The following morning each

driver loads his small truck, leaving the garage to cover his delivery route, returning at 4:00 to 4:30 P.M. The small trucks make one delivery per day.

The term "motor truck freight terminal" is not defined in the Municipal Code, being designated as a permitted use in a manufacturing district under Section 12 of the Zoning Ordinance which reads in part as follows:

"Where all operations, including loading, unloading, storage, manufacturing, processing or assembling of materials or products are carried on entirely within the lot lines, the following uses are also permitted in manufacturing districts: * * *

"Railroad, water and motor truck freight terminal and warehouse. * * *

The grouping of railroad, water and motor truck freight terminals in one category indicates the intention of the City Council to regulate freight terminals of similar character and intensity of use. The typical freight terminal involves the handling of freight of all kinds, storage for transshipment, continuous operation, with the sender usually being designated as consignor and the receiver as consignee.

The operation bears little similarity to the operation of motor truck freight terminals now in operation in various sections of the City. Motor trucks are employed for the delivery of "freight" which term is general, embracing every article of personal property which is capable of transportation. However, the freight delivered by it differs materially from freight delivered or received by motor truck freight terminals. No service is rendered other than that of completing delivery of parcels received from four department stores pursuant to contract. The sorting operation is such as may be done in any retail store. The delivery of parcels is a service assumed by retail merchandisers and is incidental and accessory to such business. The overnight handling and sorting of the parcels is incidental to delivery and should not be considered as storage of same. From the facts and circumstances of this particular case, it appears that the services rendered by Consolidated Deliveries, Inc. are similar in character to services usually rendered by retail merchandisers in and about the operation of their respective businesses.

Therefore, it is our opinion that a parcel delivery service as operated in this case is not a motor truck freight terminal use as designated in Section 12 of the Zoning Ordinance.

DAY NURSERIES

(No. 10984—Commissioner of Buildings—A. F. G.—Aug. 5, 1947.)

It was not the intention of the City Council to include in the definition of "institutional buildings", all day nurseries, but only such day nurseries as have sleeping accommodations for more than ten individuals.

Ordinance: Municipal Code, Ch. 40, 158-1.

OPINION OF FOREGOING SYNOPSIS

We have your letter of July 24, 1947, in which you quote the definition of a "Day Nursery" as defined in section 158-1 of the Municipal Code of Chicago, and also cite the definition of an "Institutional Building" as defined in Chapter 40 of the said code. You call attention to the language in the latter definition which includes day nurseries for infants as institutional buildings but only where there are sleeping accommodations for more than ten individuals.

You ask to be advised if you are correct in interpreting those private schools for children under fourteen years of age, devoted entirely to educational purposes and not having sleeping accommodations for more than ten individuals, as not being "Institutional Buildings."

We are of the opinion that your construction of this provision is correct, as plainly it was not the intention of the city council to include in the definition of "institutional buildings" all day nurseries, but only such day nurseries as have sleeping accommodations for more than ten individuals.

We might add that in a recent opinion to the Board of Health (July 2, 1947) in reference to an institution where children receive care for a period of more than four hours a day but where this period is not continuous, as for example where an institution would be open for a period of three hours in the morning and two hours in the afternoon, with an in between period of one hour during which time the children would return to their homes, we held that such an institution was not a day nursery within the meaning of section 158-1 defining "Day Nursery."

REVOKING GARAGE LICENSE

(No. 10998—Commissioner of Buildings—A. F. G.—September 29, 1947.)

The Mayor has the authority to revoke a garage license that was erroneously issued by the Building Department for a garage lacking adequate fire protection.

Citations: 173 Ill. 91.
236 Ill. 383.
152 Ill. App. 334.

Other Reference: 17 Op. Corp. Coun. 575.

OPINION OF FOREGOING SYNOPSIS

Your letter of September 3, 1947 is as follows:

"Your advice is herewith sought as to what procedure is necessary to correct an error made in good faith by a representative of this department in approving of a license which should not have been approved due to violations of ordinance provisions.

Specifically, an application to operate a Class 2 public garage was approved by this department, as a result of which the City Collector under date of August 8, 1947, issued a license.

Subsequently, on August 28th it was found that this license should not have been approved inasmuch as this garage did not have a proper fire protection, as required in Section 52-41 of the Municipal Code. As a consequence on August 28th this department requested the City Collector to cancel the approval of said license which was done in error.

The Acting City Collector replied under date of August 29th, in part as follows:

"Inasmuch as the license has already been issued, in this instance this office has no authority to 'cancel' the application by virtue of which such license was issued, nor of course, is the City Collector authorized to 'cancel' the license.

Awaiting your advice as to what recourse this department should follow."

In an opinion of this office in answer to a request from the mayor for advice as to whether any liability would arise against the City or against him personally in the event he revoked a license for a retail food business which the commissioner of buildings stated had been issued contrary to the provisions of the Zoning Ordinance through an error in his department, we said:

"In case this license is revoked by you after inquiry as to the cause and after you are satisfied that the cause exists, no liability can attach by reason of such revocation. No right accrues to a person who obtains a license that was improvidently issued in violation of an ordinance. The rule which governs in such cases is that the person who obtains the license is bound to take notice of the ordinances, and if the official who issued it exceeded his authority or issued it by mistake, the mere issuance of the paper purporting to confer the license carries no right with it and imposes no obligation on the city. *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91; *Benton v. City of Chicago*, 236 Ill. 383; *Meltzer v. City of Chicago*, 152 Ill. App. 334.

We therefore beg to advise you that such action as you deem proper, in accordance with our recommendation that you inquire into the facts, may be taken by you without subjecting yourself to any legal liability on account of it." Opinions of the Corporation Counsel Vol. XVII, page 575.

We concur in the views expressed in that opinion and suggest that you request the mayor to revoke the license, furnishing him all of the facts concerning its issuance and attach a copy of this opinion.

MEDICAL CENTER BUILDING

(No. 11006—Commissioner of Buildings—A. F. G.—November 7, 1947.)

The Medical Center Commission, in the erection of buildings, must take out permits and observe structural requirements of the Building Code of the City of Chicago.

Citations:

Statute: IRS '45, Ch. 24, 23-70, 23-71.

Cases: 311 Ill. 234, 248.

OPINION OF FOREGOING SYNOPSIS

Your letter of October 15, 1947 is as follows:

"We are in receipt of a communication from a citizen as a result of a notice originated by this department directing that a medical association stop interior alterations to a building, pending application for and issuance of a building permit.

The writer advised that the medical association is an independent public corporation and the city of Chicago has no right to interfere in matters involving building standards.

It is respectfully requested that you advise this department whether the position of the association, as so stated, is such that it does not come within the jurisdiction of the Department of Buildings of the City of Chicago."

The Medical Center District which consists of the area bounded by Ashland Boulevard on the east, Congress Street and Congress Street extended on the north, Oakley Boulevard on the west, and Roosevelt Road on the south in the City of Chicago, was created by statute, approved June 4, 1941. The Act also created a Commission of seven members, four of whom shall be appointed by the Governor. The Commission is authorized to improve and manage the District as to provide conditions most favorable for the special care and treatment of the sick and for the study of disease, and for this purpose may construct in the District, hospitals, sanitariums, clinics, laboratories or other building or structure which may be of use or benefit in the practice of medical science, or the treatment of human ailments.

The commission may acquire by condemnation any property in the District not owned by medical institutions or allied educational institutions or kindred organizations. It may sell or lease any parcel of real estate thus acquired to any medical or allied educational institution or kindred organization for the purposes of the Act. It may borrow money for financing the acquisition of land or the construction of buildings and for the operation of the District, and may issue revenue bonds payable solely from the revenue derived from the operation of the institutions or buildings within the District. It may set apart any part of the District as a park and may construct, control and maintain the same or by contract authorize the Chicago Park District or the City of Chicago to control and maintain such area as a park.

Section 8 of the Act provides: The commission shall by ordinance in the manner hereinafter set forth, classify, regulate and restrict the location

and construction of buildings within the District (except buildings used or to be used by the County of Cook in connection with the County Hospital), shall regulate the height and size of such buildings, determine the area of open space within and around such buildings, fix standards of construction, control and regulate additions to or alterations of existing buildings and prohibit the use of buildings and structures incompatible with the character of the District, to the end that that adequate light, air, quietness and safety from fire and from the communication of diseases and other dangers may be secured.

The manner of adopting the ordinance referred to above is provided in the second paragraph of said section 8 and requires the commission to request the City Plan Commission to recommend appropriate zoning regulations for the District which coordinate with the zoning of the surrounding sections of the City of Chicago. If, after a fixed time, following such request, an ordinance has not been submitted, the commission may prepare a zoning ordinance with or without the advice of the Plan Commission.

When such zoning ordinance is ready for adoption notice of a public hearing shall be posted in the District and published in a newspaper. The hearing shall be not less than ten days after date of last publication. The hearing shall be at the time appointed and opportunity offered to all who wish to be heard. The Chicago Plan Commission shall be invited to attend such hearing and make suggestions as to modifications of the proposed ordinance. All ordinances adopted by the Commission shall be subject to all restrictions upon the use and maintenance of property within the District prescribed by the Chicago Zoning Ordinance.

This limited power to zone is the only police power invested in the Commission and so far as we are able to learn even that power has not been exercised by the Commission. No power has been expressly or impliedly granted to the Commission, such as has been expressly granted to municipalities by sections 23-70 and 23-71 of the Revised Cities and Villages Act, "to prescribe the thickness, strength and manner of constructing all buildings and of the construction of fire escapes thereon," and "to cause all buildings and enclosures which are in a dangerous fire condition to be put in a safe fire condition."

There is a distinction between municipal corporations proper, such as exist by charters issued by the State, as incorporated cities, villages and towns voluntarily organized under the general Incorporation Act, and corporations such as counties, townships, school districts, park districts, and districts like the one here in question, which are frequently referred to as involuntary *quasi* corporations. Municipal corporations are those called into existence either at the direct request or consent of the persons composing them. *Quasi* municipal corporations, such as those enumerated above are at most but local organizations, which are created by general law without the consent of the inhabitants thereof for the purpose of the civil and political administration of government and they are invested with but few characteristics of corporate existence. (*County of Cook v. City of Chicago*, 311 Ill. 234 (1924).)

In the case just cited the principal question argued in the case was whether or not the city council has power to acquire an observance of its fire regulations by the county in the building of a county jail. The court found there was no delegation of police power to the counties and townships of the State, that the legislature by statute had conferred on municipal corporations such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection.

In holding that the police power delegated to the City must be construed as between the county and the city, as a delegation of power to the latter which the former is expected to observe, the court said at page 248:

"We are of the opinion that in enacting paragraph 63 of article 5 of the Cities and Villages Act, (now section 23-71) and in using the language, 'and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipalities located therein."

In view of this decision we are of the opinion that the Medical Center Commission in the erection of buildings it is authorized by law to erect must take out the permits, pay the fees and observe the structural and other requirements of the building code of the City of Chicago.

ROOMING HOUSE ORDINANCE

(No. 11016—M. H. F.—January 9, 1948.)

Dormitories maintained by the University of Chicago for the exclusive use of its own students are not subject to the annual inspection fee for hotels, and rooming accommodation buildings.

Citation: Municipal Code 137.1.

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date invites our attention to Chapter 137.1 of the Municipal Code of Chicago and you request our opinion as to whether the annual inspection fee imposed thereby is applicable to the dormitories operated by the University of Chicago for use of its student body.

Chapter 137.1, passed November 6, 1947 (C. J. 1180), as amended November 18, 1947 (C. J. 1228), defines the term hotel to include every building or structure kept, used or maintained as or advertised or held out to the public to be an inn, hotel, family hotel, apartment hotel, lodging house, dormitory or place where sleeping or rooming accommodations are furnished for hire or rent, whether with or without meals, in which ten or more sleeping rooms are used or maintained for the accommodation of guests, lodgers or roomers. It requires every such hotel operated or maintained in the city to be inspected under and by the authority of the president of the board of health and the commissioner of buildings at least twice every year, prescribes the purpose and extent of such inspection, and makes it the duty of the person maintaining or operating a hotel as thus defined to pay an annual inspection fee of two dollars for each room used for the accommodation of guests, lodgers or roomers.

You state that the University of Chicago operates a number of dormitories for the use of its student body, that no one who is not a student at the University is permitted to live in such establishments, that such dormitories are not operated for gain or profit but in the furtherance of the educational purposes of the University, and that such dormitories are not held out to the public as hotels within the meaning of that term as used in the ordinance.

Our study of the ordinance leads us to the conclusion that it was the intent and meaning of the city council in passing it and when employing

the words "kept, used or maintained as or advertised or held out to the public to be an inn, hotel," etc. to impose the inspection fee only upon hotels as defined in the definition section, or those establishments held out to the public as hotels, and not to bring within the purview of the ordinance dormitories maintained by universities for the exclusive use of their students.

While our view is that the University of Chicago is not subject to the payment of the inspection fee imposed by Chapter 137.1 upon its campus student dormitories, nothing herein contained should be construed as indicating that the city's board of health, its building and other departments, may not inspect such dormitories in the interest of health and safety.

STOCKYARDS BUILDING PERMITS

(No. 11045—F. T. M.—April 6, 1948.)

Building permits are necessary in alterations in the stockyards of pens, chutes and drives if they are of a permanent nature.

The provisions of the Building Code in respect to alterations are applicable to packing plant buildings and other structures and can be made only after a permit has been applied for and issued by the Commissioner of Buildings.

Citation: Municipal Code, 43-1, 43-2.

OPINION OF FOREGOING SYNOPSIS

Your letter of March 24, 1948 addressed to Ludwig D. Schreiber, City Clerk, has been referred to this office for acknowledgment and reply. You request information as to whether or not our Municipal Code applies to the altering of stockyards pens, chutes, drives or the altering of packing plant facilities necessitating removal of wall partitions for relocation of machinery.

Section 43-1 of Chapter 43, entitled "Building Permits" of the Chicago Municipal Code provides as follows:

43-1 It shall be unlawful to proceed with the erection, enlargement, alteration, repair, removal or demolition of any building, structure or structural part thereof within the City unless a permit therefor shall have first been obtained from the Commissioner of Buildings.

Section 43-2 provides an exemption for minor repairs necessary to maintain existing parts of buildings, not involving replacement or repair of structural load bearing members, and where repairs do not reduce means of exit, affect light or ventilation, room size requirements, and do not increase height, area or capacity of the building.

A permit would be required for the construction or alteration of pens, chutes and drives of a permanent nature. However, it has been the prac-

tice to control the size and capacity of the pens by the use of temporary collapsible or demountable partitions, which are considered in the nature of fixtures, rather than an alteration as provided in the ordinance. These partitions are also used for the purpose of providing temporary chutes or drives being auxiliary and incidental to usual daily operation.

The provisions of our ordinance pertaining to alteration of buildings are applicable to packing plant buildings and other structures and can be made only after a permit has been applied for and issued by the Commissioner of Buildings.

HOUSE TRAILERS

(No. 11047—Alderman, 42nd Ward—A. F. G.—April 16, 1948.)

The location of house-trailers on the roof of a public garage for use by persons as residences would violate the Municipal Code.

Citation: Municipal Code, 47-10, 63-2, 179.

OPINION OF FOREGOING SYNOPSIS

In your letter of March 19, 1948 you inquire as to the legality of the owner of a public garage using the roof of his building for the installation of twenty-five house trailers to be used for housing families of persons who have no connection with the operation of the garage.

If a house trailer may be construed to be a building, it would be classified under the building regulations of the code as a "single dwelling." The requirements for a single dwelling are found in Chapter 47 of the code. Section 47-10 of that chapter provides, "Subject to the provisions of this chapter a single dwelling may be located in the same building with any other occupancy, except a garage building of a greater area than eight hundred feet, * * *." Section 63-2 of the code relating to multiple use buildings provides, "A garage of Class 1 shall not be permitted in any building used for a single dwelling."

The garage in question is a Class 1 garage, over 20,000 square feet in area, four stories in height, of fire proof construction. The placing of these housing units on the roof of this garage building would in our opinion violate the two sections of the building code cited above.

If on the other hand these units are not to be considered as buildings but as vehicles of the type known as house-car trailers then they could be located only in a "trailer camp," as provided in Chapter 179 of the code. A study of the provisions of that chapter precludes the possibility that the roof of this garage could qualify as a trailer camp.

It is our opinion, therefore, that the location of house-car trailers on the roof of this garage as places of habitation would be in violation of the ordinances of the City of Chicago.

B. FRONTAGE CONSENTS

UNDERTAKERS

(No. 10793—Board of Health—A. F. G.—June 13, 1944.)

To establish an undertaking business along a boulevard the frontage consents of a majority of the property owners in the block on both sides of the boulevard must be obtained. On other streets consents must be obtained where more than one third of the buildings are used exclusively for residence purposes. The rule does not apply to any street on which street cars are operated.

Citations:

Ordinances: Municipal Code, sec. 181-3.

Other references: 21 Op. Corp. Coun. 173.

OPINION OF FOREGOING SYNOPSIS

On June 8, 1944 you transmitted a letter from a licensed undertaker, in which his lawyers take exception to the finding of this office that more than one third of the buildings in the 300 block on South Ashland Avenue are used exclusively for residence purposes. You ask our opinion in view of this letter whether or not frontage consents are required to establish an undertaking establishment in this block.

The section of the Municipal Code of Chicago applicable in this case is section 181-3 which reads as follows:

"No morgue or undertaking establishment shall be conducted or operated on or along any boulevard or pleasure driveway, or in any block in any street in which one-third of the buildings on both sides of the street in such block are used exclusively for residential purposes, without the written consent of a majority of the property owners according to the frontage on both sides of the boulevard, pleasure driveway, or street in the block in which it is proposed to conduct or operate such morgue or undertaking establishment, but nothing herein contained shall apply to any block in any street in which street cars are operated.

"Frontage consents, when required under this section, shall be obtained and filed with the board of health before a license shall be issued to an undertaker for the premises sought to be used by such licensee."

South Ashland Avenue from West Washington Boulevard to West Roosevelt Road is a boulevard under the jurisdiction of the Chicago Park District.

By section 181-3 quoted above, "No morgue or undertaking establishment shall be conducted or operated on or along any boulevard or pleasure driveway * * * without the written consent of a majority of the property owners according to the frontage on both sides of the boulevard, * * *

in the block in which it is proposed to conduct or operate such morgue or undertaking establishment."

It is our opinion therefore, that frontage consents are necessary for the establishment of an undertaking establishment in this block, because it is a boulevard and the ordinance expressly requires frontage consents in such cases. The character of buildings in the block is not controlling as it would be if S. Ashland Avenue were an ordinary city street. An opinion of this office September 25, 1940, holds similarly.

(Opinions Corporation Counsel, Vol. XXI, p. 173.)

FRONTAGE CONSENTS—HOTEL DISTRICTS

(No. 10904—Board of Health—A. F. G.—July 12, 1946.)

Generally a hotel should be construed as for residence purposes only, but where in a hotel, stores, shops, bars and other business activities are publicly carried on, such a building is not being used exclusively for residence purposes and should not be included under the frontage consent provision.

Citation:

Ordinances: Municipal Code 136.1-6.

OPINION OF FOREGOING SYNOPSIS

We have your letter of July 2, 1946 which is as follows:

"136.1-6, Municipal Code of Chicago, states in part:

'Frontage consents.) No city license shall be issued to any person to operate or conduct such a home in any block in which two-thirds of the buildings fronting on both sides of the street on or along which the proposed home may face are devoted exclusively to residence purpose * * *.' In the course of investigations by the Health Department personnel to determine compliance with this section, the question has often arisen as to the definition of the term 'residence.'

It will be greatly appreciated if you would give us an opinion to the following:

Is a fraternity house classified as a residence in accordance with Section 136.1-6 of the Municipal Code?

Is a rooming house classified as a residence in accordance with Section 136.1-6 of the Municipal Code?

Is a hotel classified as a residence in accordance with Section 136.1-6 of the Municipal Code?

Is a boarding home classified as a residence in accordance with Section 136.1-6 of the Municipal Code?"

There is no definition of the terms "residence" or "residence purpose" in the code. Webster defines "residence" as a "place where one actually lives or has his home; a persons' dwelling place or place of habitation."

This office in construing frontage consent ordinances has always held that apartment hotels, apartment houses, rooming houses and boarding houses are buildings used exclusively for "residence purposes." A "fraternity house," if of the type usually found on college campuses in which members of the fraternity live just as nonfraternity students live in the residence halls provided by the college, should be considered a "residence" for the purpose of frontage consents.

Ordinarily a hotel should be construed as for residence purposes, but where in a hotel stores, shops, bars and other business activities are publicly carried on, we do not believe such a building is used exclusively for residence purposes and should not be included under the frontage consent provision.

HOSPITAL FRONTAGE CONSENTS

(No. 10943—Board of Health—A. F. G.—February 17, 1947.)

A hospital erected before ordinances requiring frontage consents were in effect is not affected by the enactment of a subsequent ordinance requiring such consents.

Citation: 6 Op. Corp. Coun. 809.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of February 7, 1947, which is as follows:

"Attached is a photostatic copy of a letter received in this Department from the law firm.

"It would be deeply appreciated if we could be informed as to whether or not frontage consents must be obtained, before building extensions or additions can be made to a hospital or other institution for which the Municipal Code requires frontage consents, in the following cases:

1. If the institution was in operation before the passage of the ordinance requiring frontage consents for such an institution, when such addition would face only the street on which the original structure was built.
2. If the institution was in operation before the passage of the ordinance requiring frontage consents for such an institution, when such addition would extend into a street different from that of the original structure.
3. If the institution began operation after the passage of the ordinance requiring frontage consents and proper and acceptable frontage consents have been obtained, when such addition would face only the street on which the original structure was built.
4. If the institution began operation after the passage of the ordinance requiring frontage consents and proper and acceptable frontage consents have been obtained, when such addition would extend into a street different from that of the original structure."

From the law firm's letter it appears that the hospital in question has been operating since 1912. In 1923 an addition to the original building was erected. The corporation owns the property adjoining the present building up to and including the corner of E. 80th Street and contemplated the erection of another addition to the hospital. They ask if new or additional frontage consents will be required for the erection and maintenance of the proposed addition to the present hospital.

When the present hospital was established on Luella Avenue, it is presumed its establishment had the written consent of a majority of the owners of property in that block. What the property owners consented to was the character of the use and not the size of such use and in our opinion frontage consents are not required for an extension of the permitted use. And so our answer to questions 1 and 3 of your letter is in the negative.

If, however, such extension would bring the hospital to the corner facing E. 80th Street, and if in the block between S. Luella Avenue and S. Crandon Avenue, two-thirds of the buildings are devoted exclusively to residential purposes, then the written consent of the owners of a majority of frontage in that block would be required as they had not previously consented to the establishment of a hospital in that block. And so our answer to your questions 2 and 4 is in the affirmative.

If the hospital was erected or established before any ordinances requiring frontage consents were in effect, the institution acquired rights that are not effected by subsequent ordinances requiring such consents. Once legally established, the character of the premises is permanently fixed until the character of the occupation is changed. (Opinions Corporation Counsel, Vol. 6, p. 809.)

HOSPITAL FRONTAGE CONSENTS

(No. 10959—President, Board of Health—F. V. M.—April 17, 1947.)

Frontage consents are necessary for a hospital notwithstanding the fact that the hospital is to occupy a building located behind another building on the same lot.

Ordinance: Municipal Code 137-8.

Citation: 18 Op. Corp. Coun. 581, No. 8493.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of April 11, 1947, enclosing a photostatic copy of a letter received from the attorney for a hospital, requesting certain information regarding the interpretation of Section 137-8 of the Municipal Code, as it relates to frontage consents for hospitals.

You state that the Chief Medical Officer of your department has informed you that in a telephone conversation regarding this matter, he stated that it was his opinion that frontage consents to operate an institution may not be necessary when the institution is located on a lot in such a position that it will not face directly upon a street; for example, the proposed institution is to occupy a building to be located behind another building on the same lot, which latter building faces the street.

You ask for an opinion as to whether or not frontage consents are required for an institution located on a street in which more than two-thirds of the buildings fronting on both sides of the street are devoted exclusively to residence purposes, and when the institution would be in such a position on a building lot that it does not face directly upon the street.

In this connection we quote from the following opinion from this office given your department under date of April 4, 1930: (Copies of Opinions Corporation Counsel, Vol. XVIII, Chap. VIII-IX, p. 5073.)

"You have transmitted to this department a copy of a letter from an attorney at law, in regard to the erection and operation of a hospital. You state that an application has been filed with your department, together with an affidavit stating that the hospital will not face or extend on Pierce avenue (the first intersecting street on the south of the proposed site), and that the property lying between the hospital and Pierce avenue has been legally transferred, therefore frontage consents are not required on Pierce avenue. You ask for our opinion as to whether or not a permit may be issued for the erection of this hospital.

The attorney's letter recites that the corporation hospital was formed on September 11, 1929, and is about to erect a hospital at the Northwest corner of Pierce and Hoyne avenues. This section is a residential neighborhood and is zoned for apartment buildings only. That the owners along Pierce and Hoyne Avenues are opposing the construction of a hospital in the neighborhood. That the corporation applied to the Building Department for a building permit, which permit was refused. It appealed to the Zoning Board of Appeals and a hearing was had on December 10, 1929, the corporation being represented by its President and its Engineer, the President testifying that the corporation owned land to the corner of Pierce avenue. The Engineer submitted plans showing the location of buildings right up to the lot line along Pierce avenue, and also showing an entrance to the proposed hospital on Pierce avenue, and another entrance from Hoyne avenue. That the Zoning Board held that it could not get into the use of the building and could not pass upon the hospital situation, but rule, however, that the corporation construct the building only on a line eight feet north of the lot line along Pierce avenue. The letter further recites that by deed dated January 20, 1930, recorded January 23, 1930, the corporation received title to the following described premises:

South half of Lot ten (10) and all of Lots eleven (11), twelve (12), thirteen (13) and fourteen (14), in Block 2 in D. S. Lee's Addition to Chicago, in the East half of the Northwest Quarter of Section 6, Township 39, North, Range 14, East of 3rd P. M., in Cook County, Illinois.

That by deed dated February 7, 1930, the corporation conveyed the following:

Lot fourteen (14) aforesaid (except the North twenty-two (22) feet thereof);

and that in this last mentioned deed, the grantors make the following reservation:

'Subject to a right of way over any and all parts or part of the above described premises, together with an unobstructed right to use such premises for such time and in any manner necessary to facilitate any construction of building or buildings on the North twenty-one feet of said lot fourteen (14) above and adjoining lots, belonging to the grantors; the above rights are expressly reserved to the grantors, its grantees, assigns, transferees and successors for a period of ten years from date of this instrument.'

The letter further states that Lot fourteen (14) aforesaid is twenty-five feet wide along Hoyne Avenue and the last mentioned deed conveys the south three feet of lot fourteen. This is the same land and forms a part of the South eight feet of said Lot fourteen over which the Zoning Board of Appeals rules that the corporation could not build. The strip of three feet is too narrow for any improvements, and the reservation made in said last mentioned deed over a period of ten years and quoted above, bars the purchaser of said three feet from making any improvements on said three feet. This fact coupled with the order of the Zoning Board of Appeals bars construction over the South eight feet of Lot fourteen and virtually places the proposed hospital on the corner of Hoyne and Pierce Avenues. It is claimed that the conveyance of the South three feet of said lot fourteen (14) is a subterfuge designing to negative the City's ordinance requiring frontage consents, and objection is made to the issuance of a permit to the corporation to erect a hospital on the corner in question.

Basing our opinion upon the statements made in the above letter, it appears to us that the conveyance of the South three feet of Lot fourteen (14), at the time and subject to the reservation therein mentioned, land (lend) suspicion to the claim that it was designed to defeat the ordinance requiring frontage consents of property owners on Pierce avenue. * * *

Considering the facts alleged in connection with the above quoted sections of the Code, it is our thought that if a hospital were erected on the five lots mentioned, except the South three feet of Lot fourteen (14), and these three feet were controlled by the aforesaid reservation, the location of the proposed hospital would be controlled by the above sections and frontage consents required on Pierce avenue. Notwithstanding the rather peculiar conveyance of the three feet, the hospital would still 'face' or 'extend' on Pierce avenue. To give to the word 'face' or the word 'extend' in this case a more restricted or technical meaning would, we believe, defeat the plain intention of the municipal legislative body and enable a salutary measure to be nullified by artifice. If the proposed hospital building and premises are to occupy the five lots mentioned, with the exception of the South three feet of Lot fourteen (14), to all practical purposes the hospital will front on both Hoyne and Pierce avenues. If it may not strictly be said to 'extend,' in the sense of reaching Pierce avenue, it may, in our judgment, be held to 'face,' in the sense of fronting in the direction of said Pierce avenue.

Under the facts and circumstances as thus disclosed to us, it is our opinion that you should refuse to issue the permit or license without the necessary frontage consents of property owners on Pierce avenue."

We are, therefore, of the opinion that frontage consents will be required for the hospital notwithstanding the fact that it is to occupy a building located behind another building on the same lot.

FILLING STATION FRONTAGE CONSENT

(No. 10988—Commissioner of Buildings—M. H. F.—August 15, 1947.)

The installation of a buried or underground filling station tank should not be regarded as sufficient to permit the issuance of a subsequent permit several years later for additional construction work for a filling station on the site. The existence of an underground tank would not be noticeable to a subsequent purchaser of property within the area protected by the frontage consent provision.

Citations:

Ordinance: Municipal Code 59-8, 127-5.

Other reference: 20 Op. Corp. Coun. 187.

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date requests our opinion in reference to the provisions governing frontage consents contained in Chapter 59 and other portions of the Municipal Code of Chicago. In particular you raise the following questions:

(1) As to the length of time after frontage consents have been obtained that they may be considered in effect and be recognized in connection with applications for various uses. Specifically, you ask whether frontage consents filed June 6, 1946 covering the use of property for a gasoline filling station, will support an application for a filling station license filed July 29, 1947, over one year after the frontage consents were obtained.

(2). Whether the installation of a buried or underground gasoline tank on a site is sufficient compliance with work performance to permit the issuance of a subsequent permit several years later for additional work for a filling station on the site.

Chapter 59 of the Municipal Code of Chicago is a general chapter covering the matter of frontage consents in connection with the construction or alteration of buildings. Section 59-8 provides for the filing of frontage consents before any tank for the storage or sale of flammable liquids is permitted to be installed. The chapter contains no specific provision telling us the length of time frontage consents shall be considered in effect.

In the Filling Stations License Ordinance, Chapter 127 of the Code, is found a frontage consent section (127-5) which states generally that no person shall locate, construct or maintain any filling station in connection with which there is installed any tank for the storage of flammable liquids, without first obtaining the consents of certain property owners. In this chapter we find no provision stating for what duration of time a frontage consent petition shall continue to be effective as such.

We have however, on former occasions considered the question first propounded by you and in an opinion given the Assistant to the Mayor, January 14, 1938, and also an opinion given March 12, 1938, to the Division Marshal in charge of Fire Prevention, Opinions of the Corporation Counsel, Volume XX, page 187, expressed the view that the practice of the Fire Prevention Bureau to require a recheck of frontage consents before approving an application for a filling station license in those cases where a

lapse of time longer than 90 days appears between the date of the tank installation permit and the filing of an application for a filling station license, is reasonable and proper. This practice protects those property owners who may have acquired property within the area for which frontage consents are required since the date of filing the consents necessary for the issuance of the gasoline tank installation permit.

Adhering to the views thus expressed in these opinions, and in answer to your first question, we are of the opinion that before approving the application for the filling station license filed July 29, 1947, you should first require a recheck of the frontage consents filed June 6, 1946, and if any new owners of property within the area are shown and as the result of change of ownership the requisite frontage consents are lacking, see to it that the necessary consents are obtained.

Regarding your second question, our opinion is that the installation of a buried or underground tank should not be regarded as sufficient to permit the issuance of a subsequent permit several years later for additional construction work for a filling station on the site. As the existence of an underground tank would not be notice to a subsequent purchaser of property within the area protected by the frontage consent provision, our view is that before any additional construction work is done, after a lapse of several years time after the date of the installation of the underground tank, a new permit should first be obtained.

C. ZONING

PLACARDS FOR PUBLIC HALLS

(No. 10737—Commissioner of Buildings—A. F. G.—February 4, 1943.)

It is the duty of the Commissioner of Buildings to supply placards for the use of theater and assembly hall operators, showing seating capacity and aisle space.

Citations: Mun. Code; 90-43, 90-43, par. c.

OPINION OF FOREGOING SYNOPSIS

In your letter of February 2, 1943 you ask our interpretation of section 90-43 of the Municipal Code. You ask particularly if you are required by paragraph (c) of that section to approve the placards required by that section and inquire concerning the preparation of these placards.

Section 90-43 requires the owner, lessee or person in charge of every theater, public assembly unit or open air assembly unit to affix and display conspicuously in or near the box office or in or near one of the principal entrances of such theater or unit a placard covered with glass and framed. The said placard shall show the classification of the building as given by the records at the building department, the exact legal seating capacity of the structure, the total amount of aisle space in feet and inches required on the main floor, balcony or galleries, if any, and other data of a similar nature. Paragraph (c) of that section is as follows:—

"The said placards shall be obtained from the commissioner of buildings before any such buildings are open to the public, upon payment to the city collector of a fee of five dollars for each placard."

This paragraph, in our opinion, makes it the duty of the commissioner of buildings to prepare the placard and fill in the information required by section 90-43 to be shown on such placard. As his office is the only place where the required information is available it follows that the ordinance intended him to furnish it. In furnishing the placard and supplying the required information the commissioner of buildings impliedly approves the placard.

The purpose of the section is to furnish the fire prevention bureau or any other agency required to make periodical inspections of buildings of the types enumerated, information which will facilitate the making of such inspection.

AMENDED ZONING ORDINANCE

(No. 10784—Building Commissioner—A. F. G.—May 16, 1944.)

Specialty Shops as designated in the Amended Zoning Ordinance are not excluded from a business district.

Under the ordinance churches may occupy lots bounded entirely by streets and alleys in family residence districts, also in duplex residence, and group house districts, but not in any other district.

Citations: Zoning ordinance, secs. 5, 8, 9, 10.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of April 28, 1944 which is as follows:

"Your opinion is requested in reference to an interpretation of the amendments to the Chicago Zoning Ordinance as passed by the Council December 4, 1942 and now in effect.

In Section 9 of said code, referring to specialty shop districts, any use permitted in an apartment house district, excluding family residences, duplex residences, group houses and apartment houses in which there are only two apartments, is a permitted use. In Section 10, any other use permitted in a specialty shop district is a permitted use. No reference is made concerning the exclusion of family residences, duplex residences, group houses and apartment houses in which there are only two apartments.

Your opinion is desired as to whether such use is excluded from a business district.

In addition to the above, Section 5, referring to family residence districts, permits a church on a lot entirely surrounded by streets or alleys or under other conditions stated in paragraph 2 of said section.

Your opinion is requested as to whether such similar conditions must obtain to permit a church in a duplex residence district or a business district."

Section 9 referred to above permits in a Specialty Shop District any use permitted in an Apartment House District except family residences, duplex residences, group houses, and apartment houses in which there are only two apartments. Section 10 as amended June 23, 1943 (C. J. p. 366) permits in a Business District any use permitted in a Specialty Shop District, except the specialty shops permitted therein are not limited to the first story as they are in section 9. As family residences, duplex residences, group houses and apartment houses in which there are only two apartments, are not permitted uses in Specialty Shop Districts, they are by section 10 likewise not permitted in Business Districts. This is a departure from previous zoning ordinances which permitted more restricted uses in districts less restricted. Under this ordinance residence uses except residences containing more than two apartments are not permitted in districts less restricted than Apartment House Districts, except as specially provided in Manufacturing and Industrial Districts. This seems more in harmony with the true spirit of zoning.

Your second question relates to paragraph (2) of section 5, Family Residence Districts. That paragraph permits churches and other enumerated buildings in Family Residence Districts on certain lots adjoining or contiguous to any use district less restrictive than a Group House District. In permitting churches and the other enumerated buildings in the three most restricted districts on lots adjoining or on the opposite side of a street from any one of the six less restricted districts any lot in any of the six less restricted districts necessarily adjoins another lot in such district and is qualified for a church building. However, an amendment was prepared and is now pending in the city council which we think makes this clearer. This amendment strikes out paragraph (1) of section 8 and substitutes the following:

"(1) Any use permitted in a Family Residence District without restrictions except such as are applicable to auxiliary uses and any other use permitted in a Duplex Residence or Group House District,"

It is our opinion, therefore, that the conditions of section 5 re churches obtain in Family Residence, Duplex Residence and Group House Districts but do not obtain in any other district.

FENCE ORDINANCE

(No. 10830—Alderman, 41st Ward—F. P. C.—January 2, 1945.)

It would be illegal for the city to regulate the construction of fences in single family residence districts by a zoning ordinance.

Citations:

Statute: IRS '43, Ch. 24, Art. 73, Sec. 73-1.

Ordinance: Municipal Code, ch. 58.

Cases: 272 U. S. 365.

319 Ill. 84.

319 Ill. 226.

326 Ill. 467.

327 Ill. 644.

333 Ill. 355, 359.

358 Ill. 311, 319.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your correspondence of September 27, 1944 pursuant to our opinion of September 18, 1944 relative to the above subject matter. You ask whether the regulation of the construction of fences in single family residence districts could be accomplished by zoning restrictions.

There is no express reference to the subject of fences in the statutes empowering the city to pass zoning ordinances (Cities and Villages Act, Art. 73, Section 73-1, Laws of Ill. 1943). However, we believe the foregoing section gives the city some implied power to regulate the construction of fences by zoning ordinances under certain conditions. Ordinances of this character must of necessity meet the tests applicable to all zoning ordinances. The rule of law applicable is that the zoning ordinance in question "must bear some reasonable relationship to the public health, welfare, safety and morals and be not arbitrary nor capricious."

Village of Euclid v. Ambler Realty Co., 272 U. S. 365.

City of Aurora v. Burns (1925), 319 Ill. 84.

Deynzer v. City of Evanston (1925), 319 Ill. 226.

Minkers v. Pond (1927), 326 Ill. 467.

The only possible justification for such an ordinance as you suggest would be predicated upon aesthetic qualities which are not highly regarded by the courts as justifying zoning ordinances.

Brown v. Board of Appeals (1927), 327 Ill. 644.

Bjork v. Safford (1929), 333 Ill. 355, 359.

State Bank & Trust Co. v. Wilmette (1934), 358 Ill. 311, 319.

From the foregoing considerations, together with the fact that the city has already enacted legislation on the particular subject (Chicago Municipal Code 1939, Chap. 58), we are of the opinion that it would be unwise if not, in many instances, illegal to attempt to regulate the subject by a zoning ordinance and it certainly would result in confusion and militate against the proper construction of our present zoning ordinance.

HOTEL RESTAURANT

(No. 10840—Alderman, 19th Ward—F. P. C.—April 5, 1945.)

The provision in the zoning ordinance permitting a restaurant in a hotel in an apartment district as an auxiliary use is valid even though no such use would be permitted in an apartment building.

Citations:

Ordinances: Chicago Zoning Ordinance, Section 8, par. 7.

Cases: 326 Ill. 100.
326 Ill. 467.
333 Ill. 355.
337 Ill. 507.
344 Ill. 82.
349 Ill. 442.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your correspondence dated March 22, 1945, in which you request an opinion of this office on the following subjects:

"(a) Whether, and to what extent, the provisions of the Chicago Zoning Ordinance conflict with or affect various requirements in the Municipal Code of Chicago for frontage consents for the construction of buildings;

(b) Whether the City Council or the Board of Appeals can authorize the operation of a business use in a hotel located in an apartment district without granting the same privilege to owners and operators or apartment buildings in the same block."

(a) There is no conflict between the provisions of the Chicago Zoning Ordinance and the frontage consent provisions of the Municipal Code for building construction. The City Council's intention to avoid any such conflict is clearly manifested in the following language in the present Chicago Zoning Ordinance:

"Section 2. Rules of construction—definitions. * * * Nothing contained in the Chicago Zoning Ordinance shall be deemed to be a consent, license or permit to use any property or to locate, construct or maintain any building, structure or facility or to carry on any trade, industry, occupation or activity. The provisions in the Chicago Zoning Ordinance are cumulative and additional limitations upon all other laws and ordinances, heretofore passed or which may be passed hereafter, governing any subject matter in the Chicago Zoning Ordinance."

The same intention, although expressed differently, is apparent in the previous Chicago Zoning Ordinance enacted April 5, 1923. The following language appears therein:

"Section 1. Interpretation: Purpose. In interpreting and applying the provisions of this ordinance such provisions shall in every instance be held to be *the minimum requirements* adopted for the promotion of the public health, safety, comfort, morals or welfare." (Italics ours.)

It seems clear that the intention of the City Council in the enactment of the Chicago Zoning Ordinance was not to repeal, abrogate or modify the frontage consent provisions of the Municipal Code nor cause any conflict therewith. A use permitted under the Chicago Zoning Ordinance may still not be authorized unless or until all other pertinent ordinances such as license, building construction, fire and health as well as frontage consent ordinances are complied with.

While the aforesaid may be true nevertheless the Illinois Supreme Court in *Spies v. Board of Appeals*, 337 Ill. 507 (1929) held invalid frontage consent provisions in a zoning ordinance which prevented an otherwise permitted use i.e. a store in an "A" residential district on the theory that owners of frontage would otherwise have the determining power to prevent use of property and that this was tantamount to taking property without due process of law" and therefore unconstitutional. Also in *Koos v. Saunders*, 349 Ill. 442 (1932), the court held a frontage consent ordinance invalid which prevented a gas filling station in a business district. These decisions only applied to the particular sets of facts and do not invalidate our frontage consent ordinance.

(b) The City Council may not generally authorize business uses in a hotel in an apartment district without granting the same privilege to owners of apartment buildings. It may, however, permit certain specific business uses therein if they are proper auxiliary uses. The Chicago Zoning Ordinance defines the latter as follows: "Auxiliary use—a use customarily incidental and accessory to the permitted use of the lot."

The test of a zoning ordinance as pronounced by our courts is that "it must bear a reasonable relationship to the public welfare, safety, health or morals and be not arbitrary nor discriminatory."

Citing:

Bjork v. Safford, 333 Ill. 355 (1929).

Minkus v. Pond, 326 Ill. 467 (1927).

Village of Western Springs v. Bernhagen, 326 Ill. 100 (1927).

Village of Euclid v. Ambler Realty Co., 272 N. S. 365 (1926).

In our opinion the provision in Section 8, paragraph (7) of the Chicago Zoning Ordinance permitting a restaurant in a hotel in an apartment district as an auxiliary use where the entrance is from the lobby and no public advertising meets the above test and is valid even though no such use is permitted in an apartment building.

It was no doubt contemplated by the City Council that since hotels generally do not afford cooking facilities in rooms for guests that a restaurant with an entrance off the lobby not advertised to the general public but solely for the needs rather than mere convenience of the guests would not be "arbitrary" nor "discriminatory." Apartment buildings generally afford separate housekeeping and cooking facilities for the tenants and a restaurant therein would not be "a use customarily and incidental to the permitted use of the lot," so as to qualify as an "auxiliary use." Similarly the City Council could by ordinance provide for other business uses in hotels in apartment districts as "auxiliary uses" where same meet the above tests, without making similar provisions for apartment buildings in the district.

The Board of Appeals would have no power to authorize such use since it has no legislative power. It is an administrative and not a legislative nor judicial body.

Citing: *Welton v. Hamilton*, 344 Ill. 82 (1931).

ZONING BOARD DECISION

(No. 10860—Board of Zoning Appeals—A. F. G.—September 15, 1945.)

The Building Commissioner has authority to call on the Police Department for assistance in enforcing provisions of the Code. He may request the police of any other municipal agency to assist in the prosecution of a statutory mandate to stop construction of a building pending decision by the Zoning Board of Appeals on the particular zoning question involved.

Citations:

Statute: IRS '43, Ch. 24, Sec. 73-3.

Ordinances: Chicago Zoning Ordinance, Sec. 21.
Municipal Code, 13-29.

Other references: 118 Op. Corp. Coun. 566.

OPINION OF FOREGOING SYNOPSIS

Your letter of September 11, 1945, reads as follows:

"On September 4, 1945, an appeal was filed with the Board of Appeals by L. W. Roeth, an objecting property owner, from the decision of the Commissioner of Buildings in issuing a permit for the erection of a two-story brick addition to an existing metal products manufacturing plant, located in a commercial district, on premises at 5215 N. Ravenswood avenue, which, it is alleged, is in violation of the provisions of the Chicago Zoning Ordinance.

On September 4th, notice of the appeal was filed with the Commissioner of Buildings and the request made to stop all work on the building pending the decision of the board as provided by the statute.

The appellant has complained repeatedly that the work on the building was continuing and he feared that it would be completed before the public hearing of the case on September 24th.

Upon inquiry, the Building Commissioner stated he doubted his authority to stop the work.

Your opinion is requested as to whether the Building Commissioner as the enforcing officer of the zoning ordinance under the statute has the authority to request the Commissioner of Police or any other official that could be helpful to him to assist him in the prosecution of the statutory mandate. The practice of stopping work on buildings pending the decision of the board in appeal cases by the police department through the Commissioner of Buildings as the enforcing officer has been in effect since 1923, the time of the passage of the ordinance."

The Board of Appeals Zoning was created by ordinance pursuant to authority vested in the city council by Section 73-3 of the Revised Cities and Villages Act. The same section provides:

"* * * The board of appeals shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article.

It shall also hear and decide all matters referred to it or upon which it is required to pass under such an ordinance. The concurring vote of four members of the board is necessary to reverse any order, requirement, decision, or determination of such an administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under such an ordinance or to effect any variation in the ordinance, or to recommend any variation or modification in the ordinance to the corporate authorities."

By Section 21 of the Chicago Zoning Ordinance the duty of enforcing the provisions of that ordinance is placed in the commissioner of buildings.

Section 73-5 of the Zoning statute provides that an appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality, and prescribes the time and manner of filing such appeal and further provides that the officer from whom the appeal is taken shall forthwith transmit to the appeal board all the papers constituting the record upon which the action appealed from was taken.

The second and third paragraphs of this section are as follows:

"An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In this event the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application and on notice to the officer from whom the appeal is taken, and on due cause shown.

"The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the appeal within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises and to that end has all the powers of the officer from whom the appeal is taken."

It will be seen from the foregoing that when an appeal is taken under this statute from the decision of the building commissioner to the board of appeals that such appeal stays all proceedings under the decision appealed from until such time as the board of appeals has rendered its decision in the appeal from the finding of the building commissioner.

In the instant case the decision appealed from is the issuance of a building permit and the proceeding under that decision is the erection of a building. It is the duty of the commissioner of buildings to order the work of constructing the building to cease until the board of appeals has rendered its decision in the appeal from the findings of the building commissioner.

If in other cases the decision of the commissioner is one ordering the discontinuance of the use of an existing building and an appeal is taken from such decision the commissioner should institute no proceedings to stop the use of such premises until such appeal is decided by the board.

Under the provisions of the Zoning statute, a new and different procedure with reference to the administrative acts of the building commissioner, including the power to issue permits was inaugurated by the legislature and the powers of the building commissioner are, in a material

manner, changed by this statute. By this statute his decisions are made subordinate to the decision of the board of appeals and cannot become final until the time in which an appeal may be taken from his decision to the board of appeals has elapsed.

In another respect the situation as it has application to the issuance of a permit is different now than it was prior to time of the passage of the zoning ordinance and the zoning statute. A person accepting a permit from the building commissioner cannot set up as an estoppel the fact of his having obligated himself under contracts entered into pursuant to the issuance of the permit. The reason being that a permit under the zoning laws is accepted, subject to the provisions of these laws. The statute fixed a definite right on the part of any person aggrieved to appeal from the decision of the building commissioner to the board of appeals, and to have reviewed the decision of the board of appeals by a court, so that no final right is vested in the person obtaining the permit until the statutory time for appeal on the part of the person aggrieved has elapsed. (Opinions Corporation Counsel, Vol. XVIII, p. 566, No. 6570.)

Section 13-29 of the Municipal Code of Chicago reads as follows:

"Whenever it shall be necessary, in the opinion of the commissioner of buildings, to call upon the department of police for aid or assistance in carrying out or enforcing any of the provisions of this code which it is his duty to enforce, he shall have the authority to do so, and it shall be the duty of the commissioner of police, or of any member of the department of police, when called upon by said commissioner of buildings to act according to the instructions of, and to perform such duties as may be required by said commissioner of buildings in order to enforce or put into effect the said provisions of this code that it is his duty to enforce."

By virtue of the foregoing section it is our opinion the building commissioner has authority to call on the department of police for assistance in enforcing provisions of the code which it is his duty to enforce, and it is the duty of the department of police to furnish such assistance and perform such duties in respect thereto as may be required by the commissioner of buildings.

ZONING

(No. 10863—A. F. G.—October 19, 1945.)

The exclusion of residences from areas devoted to stores and factories is a proper exercise of the powers granted to municipalities by the zoning statute.

Citations:

Statute: IRS '43, ch. 24, 73-1, Revised Cities and Villages Act.
Case: 319 Ill. 84, 149 N. E. 784.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of October 9, 1945, which is as follows:

"It has come to my attention that the City of Chicago recently passed an amendment to the zoning ordinance, which I understand, not only restricts the use of property but also prevents the use of a less restricted property from being used in a restricted sense. In other words, it is my understanding that the ordinance is so drawn that it prevents the erection of homes on industrial and business sites.

I am wondering under what theory this ordinance proceeds, and for that reason I would appreciate receiving a copy of this latest amendment if they are available."

The first zoning ordinance of the City of Chicago was adopted in 1923. The use districts established then were four in number: Residence; Apartment; Commercial and Manufacturing. On December 3, 1942, a comprehensive amendment was adopted affecting all sections of the ordinance, and displacing 49 sets of original maps with 50 sets of new maps. The use districts were increased to nine, viz: Family Residence; Duplex Residence; Group House; Apartment House; Specialty Shop; Business; Commercial; Manufacturing and Industrial.

No residential use is permitted in a non-residential district except in Specialty Shop, Business or Commercial districts where apartment houses containing more than two apartments are permitted.

Zoning laws are based on the police power to enact laws for the safety, health, morals and general welfare of the people, and prohibitive restrictions are valid if they bear a reasonable relation to those purposes.

The zoning regulations of the State of Illinois are found in Article 73 of the Revised Cities and Villages Act. The first section of that Article which sets out the objectives of the law is in part as follows:

"Sec. 73-1. OBJECTIVES OF ARTICLE—POWER TO REGULATE HEIGHT AND BULK OF BUILDINGS—LOCATION OF TRADES AND INDUSTRIES—DISTRICTS.) To the end that adequate light, pure air, and safety from fire and other dangers may be secured; that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted, the corporate authorities in each municipality have the following powers:

(1) To regulate and limit the height and bulk of buildings hereafter to be erected; (2) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (3) to classify, regulate, and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses; (4) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this article; (5) to fix standards to which buildings or structures therein shall conform; (6) to prohibit uses, buildings, or structures incompatible with the character of such districts; and (7) to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed under this article."

The validity of this statute was sustained by the Supreme Court of this State in *City of Aurora v. Burns*, 319 Ill. 84; 149 N. E. 784 (1925). The

case involved also the validity of any ordinance prohibiting stores in residential districts. In sustaining the statute and the ordinance the court said:

"The State imposes restraints upon individual conduct. Likewise its interests justify restraints upon the uses to which private property may be devoted. By the protection of individual rights the State is not deprived of the power to protect itself or to promote the general welfare. Uses of private property detrimental to the community's welfare may be regulated or even prohibited. (*Koy v. City of Chicago, supra; Booth v. People, supra.*) The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. These objects, among others, are attained by the exercise of the police power." (Citing cases.)

Prohibiting residential uses in areas zoned for business, commercial and manufacturing uses is a departure from the original theory of zoning, that of keeping business and other less restricted uses out of residential areas.

If, as pointed out in the quotation from our Supreme Court cited above, "The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted," it follows logically that the exclusion of residences from areas devoted to stores and factories would accomplish the same desirable ends and is a proper exercise of the powers granted to municipalities by the zoning statute.

CEMETERY WITHIN CITY LIMITS

(No. 10871—Alderman, 41st Ward—M. H. F.—December 4, 1945.)

Under the Municipal Code no human body can be buried within the city other than in a duly established cemetery, and no cemetery shall be established in an apartment house district.

Citations:

Statute: IRS '45, ch. 24, sec. 23-84, art. 73.

Ordinance: Municipal Code, 93-14, 93-15.

Chicago Zoning Ordinance, sec. 24.

OPINION OF FOREGOING SYNOPSIS

Your letter of November 27, 1945 states that the Passionist Fathers have asked for advice regarding the possibility of locating a small private

cemetery on their monastery grounds at the southwest corner of Harlem and Talcott avenue, in the 41st Ward. It is said that the adjoining property is owned by the Immaculate Conception Church and that it does not appear that it will raise any objection. Our opinion is requested.

By Section 23-84 of the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, 1945, the following express power has been conferred upon the city:

"To establish and regulate cemeteries within and without the municipal limits; to acquire lands therefor, by purchase or otherwise; to cause cemeteries to be removed; and to prohibit their establishment within one mile of the municipal limits."

Exercising such power the city council of the City of Chicago has enacted Sections 93-14 and 93-15 of the Municipal Code of Chicago, which sections read as follows:

"93-14. Establishment or enlargement of cemetery.) It shall be unlawful for any person to establish, enlarge, or alter the boundaries of any cemetery within the city, or within one mile thereof, unless authorized by an ordinance of the city council.

93-15. Burial within city.) It shall be unlawful to inter or bury any dead human body in any place within the city other than a duly established cemetery."

Exercising its special zoning powers conferred by Article 73 of the Cities and Villages Act, the city council has passed a Chicago Zoning Ordinance, under which the establishment of a cemetery in any zoning district is declared to be a special use (Section 2), and by Section 24 it is provided as follows:

"No special use shall be approved in a Family Residence, Duplex Residence or Group House district, excepting (a) municipal recreation building or community center; (b) a public park or playground; (c) a railroad, right of way or passenger station; (d) a bus terminal or street railway terminal.

No special use shall be approved in an Apartment House or Specialty Shop district, excepting (a) any special use which may be approved in a Family Residence, Duplex Residence or Group House district; (b) a hospital or sanatorium for the care of contagious diseases or incurable patients; (c) an institution for the care of the insane or feeble-minded; (d) a parking lot; (e) a telephone exchange; (f) an electric substation."

Inspection of the Chicago Zoning Ordinance Use District Map, Map 6, shows that the southwest corner of Harlem and Talcott avenues is within an Apartment House District Zone.

As Section 93-15 makes it unlawful to bury any dead human body within the city other than a duly established cemetery, and Section 24 of the Chicago Zoning ordinance provides that no cemetery shall be established in an Apartment House district, our opinion is that a private cemetery may not be located on the grounds of the Passionist Fathers at the site mentioned.

The fact that owners of adjoining property might not object to the cemetery would be immaterial.

HOME BEAUTY SHOP

(No. 10877—F. P. C.—December 14, 1945.)

A person residing in a residential district cannot conduct a beauty shop in a private home.

A beauty shop is not a permitted use in a residence district and the board of appeals zoning would not have the power by variation to permit such a use.

No Citations.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of December 6, 1945 in which you discuss the problem created in your city by the application of beauty operators for permission to carry on their trade in their own homes located in residential districts. You ask under the Chicago zoning ordinance if we would permit a person residing in a residential district to conduct a beauty shop in her own home as a home occupation?

There are nine use districts created by the Chicago zoning ordinance, the first four being residential, viz: Family Residence, Duplex Residence, Group House and Apartment House districts. There are five non-residential use districts of which Specialty Shop districts is the most restrictive. In that district "beauty parlors" are permitted uses on the first story of a building. In residential districts the following auxiliary uses are permitted:

"A surgeon, physician, dentist, lawyer, clergyman or other professional person may use his residence for consultation, emergency treatment or performance of religious rites but not for the general practice of his profession."

Under the Rules Governing Variations, no variation shall be allowed to permit a non-conforming use in any residence district.

So, under the zoning ordinance a beauty shop is not a permitted use in a residence district nor would the board of appeals zoning have power by variation to permit such a use.

CHAPTER VIII — RELIEF

CARE OF CITY PAUPERS BY COUNTY

(No. 10746—Chicago Welfare Commission—A. F. G.—May 8, 1943.)

The County may charge the City for medical care of persons treated at the County Hospital at the request of the Chicago Welfare Administration.

Citations:

Statute: IRS '41, ch. 34, sec. 24, sub. div. 7. Ch. 107, sec. 14a.

Case: 112 Ill. App. 510.

OPINION OF FOREGOING SYNOPSIS

Your letter of March 23, 1943 is as follows:

"It has been brought to my attention that the Cook County Board of Commissioners is contemplating billing the City of Chicago Welfare Administration for medical services rendered to its paupers in the Cook County Hospital.

As you no doubt are aware, responsibility for care of paupers in this State shifted from the County to the State, and since July, 1936, to local townships or cities. There was no problem as long as the County was responsible for the care of paupers, since most facilities like the County Hospital were maintained and supervised by the Cook County Board of Commissioners. The amendment to the Pauper Act, chapter 107, section 14(a), Illinois Revised Statutes, 1941, shifted responsibility for the care of paupers to their respective local governmental units, but left doubt as to whether local overseers of the poor could use county facilities without charge.

I understand that the seven counties having hospitals, except Cook, are charging local governmental units for services rendered to their paupers for use of County Hospital facilities. However, I do not know the basis for this.

I am attaching herewith copies of correspondence between the Illinois Emergency Relief Commission, the Chicago Welfare Administration, and the Cook County Board of Commissioners regarding this problem.

In April, 1938, the Cook County Board of Commissioners asked the Honorable Thomas J. Courtney, State's Attorney, if it had a duty to extend the facilities of the County Hospital to paupers of local governmental units within Cook County and the following reply was received:

'While the Chicago Relief Administration has a duty to care for clients who need medical care, the County, through its hospital, is also under a duty to afford medical care to the extent of its facilities.'

In order that I may be prepared to meet this problem, I should like to have your opinion and advice on the following questions:

1. Is the Chicago Welfare Administration properly chargeable by the Cook County Board of Commissioners for medical services rendered to its paupers in the Cook County Hospital?
2. Assuming the City of Chicago is properly chargeable, may the County Board be restricted to billing us to the actual costs for care extended, that is, on a non-profit basis?"

Counties, like cities, villages and other municipal corporations are created by authority of the legislature to better accomplish the purposes of local government. They have no inherent power and can only exercise such powers as are given by law or such as arise by necessary implication or are indispensable to carry into effect the object and purpose of their creation.

The statute in enumerating the powers of counties provide that each county shall have power "To cause to be erected, or otherwise provided, suitable buildings for, and maintain a county hospital and necessary branch hospitals for the care of such sick as may by law be proper charges upon the county, and to provide for the management of the same." (Ill. Rev. Stats. 1941 ch. 34, sec. 24 subd 7.)

Since 1936 the duty of providing relief to poor and indigent persons resident in the City of Chicago has been in the municipality. That duty includes the obligation to provide medical care where necessary. This may be provided by care in the home of the pauper or by hospital care in a private hospital or in the county hospital.

The duty of the county to furnish hospital care for the sick is limited to such as are "by law proper charges upon the county." Poor and indigent persons resident in cities of more than 500,000 inhabitants are not proper charges of the county but by section 14a of the Paupers Act the duty to care for such persons is in the city. Section 24 of the same act does however make the county chargeable for expenses in emergencies where a person not coming within the definition of a pauper shall fall sick or die not having money or property to pay his board, nursing and medical aid or burial expenses, even though such person is a resident of a city of more than 500,000 inhabitants. Persons not paupers within the meaning of the statute, but having at the time insufficient money or property to pay for medical services, are entitled to county aid. (*City of Chester v. County of Randolph*, 112 Ill. App. 510, 1927.)

While the law is not clear in the matter, we are inclined to the opinion that where the Welfare Administration sends to the county hospital for medical care persons on relief the county may charge the city for such service. We are also of the opinion that these charges should not exceed the actual cost of the services furnished.

DESTROYING OLD RECORDS

(No. 10884 — Commissioner, Chicago Welfare Administration—
F. V. M.—January 15, 1946.)

Records of past years kept by the Chicago Welfare Administration may be destroyed if in the opinion of the Commissioner of the Administration their retention would be of no value.

Citations:

Statute: IRS '45, ch. 107.

Ordinance: Municipal Code, secs. 21-8, 21-9.

OPINION OF FOREGOING SYNOPSIS

Your letter of January 8, 1946, with reference to the disposition of case records or parts of such records on persons who at one time received assistance from the Welfare Administration or its predecessor-organizations, is at hand.

Without going into the matter of the necessity for the disposition of such records as set out in your letter we will take up the questions submitted by you in this connection:

1. The right to authorize destruction of the entire case record when a certain number of years has elapsed since the death of the last person who received assistance in the family group represented by that case record.

2. The right to authorize destruction of certain parts of the case record, for example, all parts except the recipients' sworn statements of need and financial records relating to assistance granted, when a certain number of years has elapsed since the death of the last survivor who received assistance with the family group represented by that case record.

Section 29 of "An Act to revise the law in relation to paupers (Approved March 23, 1874. R.S. 1874, p. 754), Ill. Rev. Stat. 1945, Chap. 107, p. 2506, provides in part as follows:

"30. Account by overseer.) § 29. The overseer of the poor or like officer in each city, village or incorporated town having a population of more than 500,000 inhabitants, the overseer of the poor in each town in counties under township organization where the poor are supported by townships, and of each precinct in counties not under township organization, shall keep an accurate account, showing the name of every person relieved or supported by them in their municipality, town or precinct; the place of his birth; the manner in which he is relieved or supported whether in whole or in part at the expense of the county, municipality or town; the amount of the aid furnished; whether the dependency was on account of idiocy, lunacy, intemperance, or other cause, stating the cause. * * *

Sections 21-8 and 21-9 of the Municipal Code of Chicago provide the following:

"21-8. The commissioner shall keep records of account showing all receipts and expenditures. Such records and all documents, vouch-

ers, receipts and other papers shall be open to the inspection of the comptroller, the city council, or any committee thereof. (Amend. Coun. J. 6-3-42, p. 7105.)

21-9. The commissioner shall keep a register showing the name of every person relieved or supported by him in the city; the place of his birth; the manner in which he is relieved or supported, whether in whole or in part at the expense of the city; the amount of aid furnished, and the cause for furnishing such relief.

Before the first meeting of the county board in September of each year the commissioner shall file two copies of this record with the county clerk, and one copy each with the mayor, the comptroller, and the city council. (Amend. Coun. J. 6-3-42, p. 7105.)"

We find no provision in the statutes of the State of Illinois or in the Municipal Code of Chicago authorizing the destruction of the foregoing records.

We are therefore of the opinion that none of the records which you are required to keep in accordance with the foregoing can be destroyed by you.

However, we do not believe that the foregoing sections apply to the case records kept by your office, and therefore we are of the opinion that such records may be destroyed by you if and when you consider them no longer necessary in the operation of your administration.

REPAYMENT OF RELIEF BY PAUPERS

(No. 10886—Commissioner, Chicago Welfare Administration—F. V. M.
—February 4, 1946.)

Where an employable person has prospects of an early return to his employment but does not have sufficient funds for his immediate living expenses he can be regarded as a pauper and be given assistance by the Chicago Welfare Administration.

No condition may be attached to a grant of relief or support to a person entitled thereto, and no promise may be exacted from such a person to repay any excess of money paid to him.

Citations:

Statute: IRS '45, ch. 107, par. 14a.
Cases: 122 N.E. 274 (Mass.).
197 N.E. 677, 678.
138 Mass. 109, 110, 111.

OPINION OF FOREGOING SYNOPSIS

We are replying to your letter of January 23, 1946, in which you state that during periods of temporary work stoppage employable persons sometimes apply for assistance; that such persons are accepted for assistance

according to the tests applied to all persons who are in need. You state further that problems confront you in such cases because the period of unemployment is indefinite but the possibility is strong sometimes that it will be of short duration; that assistance is granted in advance on a monthly basis because certain expenses such as rent, gas, light and heat, usually are paid on a monthly basis.

You present two questions for answer: (1) Where an employable person has prospects of an early return to his employment but does not have sufficient reserves for his immediate living expenses, can he be regarded as a pauper?

"Pauper" is judicially defined in the case of *Symmes Arlington Hospital, Inc. v. Town of Arlington*, 197 N.E. 677, 678, in which the court said:

" * * * A pauper is 'one residing or found in any town where he falls into distress, and stands in need of immediate relief.' *Shearer v. Inhabitants of Shelburne*, 10 Cush. 3, 5, quoted in *City Hospital of Quincy v. Milton*, 232 Mass. 273, 275, 122 N.E. 274. G.L. c. 117, § 14. 'A person may have property and yet fall into distress, and be in need of immediate relief, from inability to avail himself of it. On the other hand, a person may have no property, and yet if he is supported by relatives or friends, would not be in need of immediate relief, within the meaning of the statute.' *Inhabitants of Templeton v. Inhabitants of Winchendon*, 138 Mass. 109, 110, 111. * * *"

We are therefore of the opinion that such a person as you refer to in the foregoing question may be regarded as a pauper.

You also ask, (2) Can such a person, if regarded as a pauper, be required to promise to repay that part of cash assistance granted to him which proves to be excess by his return to employment (independent of the date of his first pay check)?

In view of the language of the statute which reads in part as follows:

"14a. Support by municipalities of over 500,000 population.) § 14a. Cities, villages and incorporated towns, having a population of more than 500,000 inhabitants, and all incorporated towns which have superseded civil townships, shall relieve and support all poor and indigent persons lawfully resident therein, except as herein otherwise provided. (As amended by act approved Dec. 11, 1936. L. 1935-36, Second Sp. Sess., p. 78.)" (Ill. Rev. Stat. 1945, Chap. 107, Par. 14a, p. 2502.)

we do not believe that any condition may be attached to a grant of relief or support to a person entitled thereto and in our opinion exacting a promise from such a person to repay any excess of cash paid to him would therefore be illegal.

However, there is no law which compels relief allotment on a monthly basis and if the Commissioner has reason to believe that need will be terminated sooner he should exercise his judgment by partial payments.

CHAPTER IX — PUBLIC WAYS

A. DEDICATION AND VACATION

PLAT APPROVAL

(No. 10805—Chicago Plan Commission—A. F. G.—July 21, 1944.)

A proposed ordinance requiring improvement of all streets and alleys in a subdivision before approval of the plat is invalid as being unconstitutional as to the rights of property owners and lack of power in the State and municipality to enact such legislation.

Citations:

Constitution: Art. II, Sec. 13, Ill. State Constitution.

Statute: IRS '23, ch. 24, par. 71. ch. 47, page 953.

Cases: 102 Ill. 64, 77.

147 Ill. 66.

180 Ill. 341.

236 Ill. 129.

Other references: 11 Op. Corp. Coun. 448.

14 Op. Corp. Coun. 539.

OPINION OF FOREGOING SYNOPSIS

Your letter of May 25, 1944 transmitting copy of your printed publication *Building New Neighborhoods* together with some typewritten changes in the provisions of that publication relating to subdivisions has been received.

You request that we incorporate these provisions in ordinance form for submission to the city council for passage. We have hesitated to draft such an ordinance for the reason that we question the power of the city to enact a valid ordinance which includes many of the suggested requirements.

Your plan requires, among other things, that the owner of land before a plat of a subdivision is finally approved, must furnish certificates from the proper municipal authorities that "all streets and alleys shown on the plat have been graded and improved and that sanitary and storm water sewers or combination sewers and water mains have been installed in accordance with the approved specifications."

This office in an opinion dated January 10, 1922 (Opinions of the Corporation Counsel Vol. 11, page 448,) in regard to the legality of an ordinance "providing that subdividers of land to be sold for dwelling purposes shall have proceedings instituted for water and sewers at the time of filing of the plat of subdivision," held the city was without power to impose such a requirement on the owner of property and an ordinance containing such a provision would undoubtedly be held invalid.

Another requirement of your plan limits the minimum width of lots to forty feet and the minimum area to four thousand square feet. In *People v. Cook*, 180 Ill. 341 (1908) where the question arose in a collateral proceeding for judgment against delinquent lands on a special assessment for laying drain pipes, it was held that the ordinance which subdivided the tract into forty-four parcels was void. The decision was not rested on the want of an enabling act, but upon the rights of the property owner. The court said:

"The owner of property cannot be compelled to subdivide his land into twenty-five foot strips fronting upon a street. The owner has a right to subdivide his land in such a way as he sees fit. He may use his own pleasure and best judgment in subdividing it so that it will produce to him the best revenue. A municipality cannot dictate to the owner how he shall subdivide his land."

Other provisions in your proposed ordinance such as requiring "restrictive covenants to be made part of the plat" and the requirement that "easements of at least ten feet for public utilities be made part of the plat" and the prohibition of private streets seem to us to run counter to constitutional guaranties.

The provision in the proposed ordinance which requires that the subdivider "shall dedicate areas for parks, playgrounds, school sites or other public spaces up to ten percent of the total acreage of the subdivision" has been found constitutionally objectionable by this office in an opinion to the chairman of the Judiciary Committee of the City Council, January 27, 1926. (Opinions of the Corporation Counsel Vol. 14, p. 539.) Because that opinion discusses at length this exact provision, we quote it in full:

"Your letter of recent date in which you request an opinion as to the power of the City Council or of the State Legislature to pass legislation to provide 'that any tract of land of ten acres or more in area, when subdivided into lots of less than one acre each in size, shall not be platted or accepted by the City, unless in such new subdivisions adequate reservations are made for such public play ground and school sites as the City may deem necessary,' has been referred to the undersigned for consideration and reply.

"In the year 1921 our legislature passed an act effective July 1, 1921, authorizing the creation of plan commissions in cities, villages and incorporated towns (Smith-Hurd Revised Statutes of Illinois, 1923, Chapter 24, Paragraph 71, Page 228). Section 1 of said act vests plan commissions, extant at the time of its enactment and which have been recognized by the council in any city, with all the powers thereby conferred upon plan commissions created pursuant to said act. Section 2 of said act provides that any such commission, among other things, may prepare and recommend to the City Council for adoption a comprehensive plan of public improvements, which plan, after its adoption by the council, shall be known as the official plan of such city. Said Section 2 further provides that

'Such plan may include reasonable requirements in reference to streets, alleys and public grounds in unsubdivided lands within the corporate limits and in contiguous territory outside of and distant not more than one and one-half miles from such limits, and not included in any city, village or incorporated town, such requirements to be effective whenever such lands shall be subdivided after the adoption of such plan.'

"Section 3 of said act provides as follows:

'No map or plat of any subdivision presented for record, affecting land within the corporate limits of any city, village or

incorporated town, which has adopted heretofore or shall adopt hereafter an official plan in the manner prescribed in this Act, or in contiguous territory outside of and distant not more than one and one-half miles from such limits and not included in any city, village or incorporated town, shall be entitled to record or shall be valid unless the subdivision thereon shown, shall provide for streets, alleys and public grounds in conformity with any requirements applicable thereto of such official plan.'

"Thus, by the foregoing act, the legislature has attempted to vest the City Council with the power to provide, among other things, for the acquisition of public grounds in unsubdivided lands. Clearly, if this act be constitutional, the City of Chicago could accomplish your purpose by pursuing the course outlined in said act. Therefore the question presents itself: Is the Plan Commission Act in so far as it relates to the creation of public grounds in unsubdivided lands, a valid enactment? In considering this question the following constitutional and statutory provisions should be born in mind:

"1. Article XIV of the amendments to the Constitution of the United States, Smith-Hurd Statutes of Illinois, 1923, page XXI, provides, among other things, as follows:

" * * *; nor shall any State deprive any person of * * * property, without due process of law, * * *."

"2. Section 13 of Article II of the Constitution of Illinois (1870), Smith-Hurd Revised Statutes of Illinois (1923), page XL, reads as follows:

" 'Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken.'

"3. Section 1 of the Eminent Domain Act, Smith-Hurd Revised Statutes of Illinois (1923), Chapter 47, page 953, reads as follows:

" 'That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, said compensation shall be ascertained by a jury, as hereinafter prescribed.'

"In the case of *City of Chicago v. Wells*, reported in Volume 236 Illinois, at page 129, our Supreme Court had before it for consideration the question of the right of the owner of lands to make a subdivision thereof. At page 132 the court says:

" 'Section 2 of the Bill of Rights provides that no person shall be deprived of property without due process of law, and under that provision no person can be deprived of property by legislative act or ordinance. The ordinance in question does not deprive appellant of her land, but it does deprive her of her control and dominion over it. In Austin on Jurisprudence (Vol. 2, p. 817), property is defined as follows: "Taken with its strict sense it denotes a right— indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration,—over a determinate thing." In *Rigney v. City of Chicago*, 102 Ill. 64, the court said (p. 77): "Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully

exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution." In *Braceville Coal Co. v. People*, 147 Ill. 66, the same definition of property is adopted as follows: "Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it." The right of dominion, possession and power of disposition over a tract of land includes the right of an owner to subdivide it in such a way as he sees fit or to leave it unsubdivided. That is the principle upon which *People v. Cook*, *supra*, was decided, where it was held that an owner may use his own pleasure and best judgment in subdividing his land or refusing to subdivide it, and that a municipality cannot dictate to him how he shall subdivide his land or that he shall subdivide it at all. * * * The constitution, which stands for and expresses the will of the people, prohibits an interference with rights of property by legislative enactment, and denies to the legislature the power to provide that a municipality may subdivide the property of an owner without his consent, for any purpose whatever.'

"It is obvious that the creation and acquisition of public grounds in the manner outlined in the Plan Commission Act constitutes a taking of private property for public use and that under the foregoing constitutional provisions such a taking is not permissible unless the owner be compensated. The Plan Commission Act contains no provision for such compensation.

"For the foregoing reasons I am of the opinion that the proposal 'that any tract of land of ten acres or more in area, when subdivided into lots of less than one acre each in size, shall not be platted or accepted by the City, unless in new subdivisions adequate reservations are made for such play ground and school sites as the City may deem necessary,' goes farther even than is justified by the statute and the constitution, and that there is serious doubt as to the constitutionality of the Plan Commission Act.

"I am also of the opinion that the City of Chicago cannot require an owner of unsubdivided lands to make dedication of a portion thereof for public play ground and school sites as a condition precedent to the exercise of his right to subdivide such lands."

We do not believe that valid enabling legislation could be enacted which would vest power in the city to pass this ordinance because of the inhibitions of the constitution which apply as well to the legislature as to municipalities and "denies to the legislature the power to provide that a municipality may subdivide the property of an owner without his consent for any purpose whatsoever." (*City of Chicago v. Wells*, *supra*.)

While we believe that the proposed ordinance would be a forward step in city planning and would aid in the redevelopment of many of the blighted areas of the city we are convinced that the constitutional rights of property owners stand in the way of its adoption.

APPROVAL OF PLAT

(No. 11088—J. D.—December 6, 1948.)

The approval of a submitted plat by the examiner of subdivisions and by the council without some affirmative act on the part of the City to indicate acceptance does not constitute an acceptance by the City of the streets as shown on the plat.

Citations:

Statute: IRS '47, Ch. 24, Sec. 1-7.

Cases: 106 Ill. 353.

124 Ill. 235.

206 Ill. 155.

279 Ill. 312.

309 Ill. 524.

334 Ill. 46.

Other Reference: 21 Op. Corp. Coun. 188.

OPINION OF FOREGOING SYNOPSIS

In your letter of November 19, 1948 concerning the above subject matter, you request us to provide the Federal Housing Administration and the John Hancock Mutual Life Insurance Company with a statement for their files, to the effect that the approval of the plat above described by Howard C. Brodman in his official capacity as ex-officio examiner of subdivisions, and the further approval by the City Council constitutes and is tantamount to the acceptance by the City of the streets and alleys shown on the plat of the subdivision submitted to this office with your letter.

Section 1-7 of the Cities and Villages Act provides in substance that no map, plat or subdivision shall be entitled to record or of any validity until it shall have been approved by the City Council or some officer designated in their behalf. (Ill. Rev. Stat. 1947, Chap. 24, Para. 1-7.)

By ordinance, the superintendent of maps, is ex-officio examiner of subdivisions and it is his duty to approve, after examination, any map, plat or subdivision in compliance with the statutory provision above referred to (Section 8-34 of the Municipal Code of Chicago).

The Supreme Court in discussing this question in the case of *People v. Massieon*, 279 Ill. 312 (1917) at page 315 says:

"Where the provisions of the statutes and the ordinances of the City have been complied with in the making of a plat for an addition to the City, the duty of the council to approve the plat is ministerial and may be enforced by mandamus.

The right to subdivide land within the corporate limits not being barred by statute, it may be done without regard to public convenience. A municipality, by the acceptance of a plat and giving its approval, is not bound to accept the streets and alleys therein dedicated to the public use, and under its corporate powers is not compelled to exercise any governmental function over those dedicated streets and alleys."

In *Nimpfer v. Village of Fox Lake*, 334 Ill. 46 (1929) the Supreme Court in discussing the acceptance of streets as shown by a plat of dedication, stated the rule to be as follows: (p. 50)

" * * * The making and recording of such a plat is no more than an offer, which is binding on the maker of the plat but not upon the

municipal authorities until acceptance. The owner of the property cannot by making a plat of an addition to a city, impose upon the public authorities the burden of caring for the streets and alleys included in his subdivision of the property. (*Littler v. City of Lincoln*, 106 Ill. 353; *Hamilton v. Chicago Burlington and Quincy Railroad Co.*, 124 id. 235.) The approval of the plat by the city council is not an acceptance of the streets and passageways shown upon the plat. Notwithstanding such approval the city still has the right to elect what streets upon the plat shall become public highways and public charges upon the municipality for their maintenance. (*Russell v. Chicago and Milwaukee Electric Railway Co.*, 206 Ill. 155; *People v. Massieon*, 279 id. 312; *Hoerrmann v. Wabash Railway Co.*, 309 id. 524.) The making of a plat not in compliance with the statute, and the sale of lots with reference thereto, are only evidence of an intent to dedicate, which, like every other dedication, to be made complete and carried into effect so as to create public rights, must be accepted and acted upon by the public." * * *

Of like nature and similar content is a previous opinion rendered by this office. (See Opinions of the Corporation Counsel and Assistants, Volume 21 at page 188 February 1941.)

We are of the opinion that the approval of the plat by the examiner of subdivisions and by the council without some affirmative act on the part of the City to indicate acceptance does not constitute an acceptance of the streets as shown on the plat by the City. We therefore are unable to comply with your request.

B. USE OF STREETS, ALLEYS AND SIDEWALKS

REMOVING STREET OBSTRUCTIONS

(No. 10783—Engineer of Special Improvements—J. J. D.—May 4, 1944.)

The Chicago Rapid Transit Company is obliged to remove obstructions caused by their elevated pillars. The expense incurred thereby must be borne entirely by said company.

Citations 324 Ill. 618.

OPINION OF FOREGOING SYNOPSIS

We acknowledge your request for an opinion concerning proper procedure to secure the removal of certain columns located beyond curb lines and in city streets, which columns support the elevated railroad structure where the said structure intersects Ashland avenue, Western avenue and Lake street in the City of Chicago.

We are of the opinion that the Chicago Rapid Transit Company is obliged to remove the columns in question from the public thoroughfares referred to and that the expense incurred in connection therewith must

be borne entirely by the said company. (*City of Chicago v. Chicago City Railway Company*, 324 Ill. 618.

The procedure to be followed in accomplishing this end would be dependent upon the circumstances existing at the time the said removal was requested by the city.

REMOVING STREET CAR TRACKS

(No. 10890—Commissioner, Public Works—W. H. S.—February 11, 1946.)

The Commissioner of Public Works has no authority to grant permission to remove the tracks and equipment from the Wells Street viaduct.

An ordinance should be passed by the City Council authorizing removal of the tracks.

Citation: July 8, 1942, C. J. 7251, 7252.

OPINION OF FOREGOING SYNOPSIS

The above subject matter was referred to in your letters addressed to this office under date of January 26, 1945, May 31, 1945, June 4, 1945 and your letter under date of September 13, 1945, addressed to Hon. James F. Young, Acting Chairman of the City Committee on Local Transportation, which latter communication was referred to us for reply.

Your request for an opinion in the letters referred to above is covered by the following questions:

- (1) What, if any, Council action or action by any other body, official or authority is necessary before the Chicago Surface Lines may remove their tracks and equipment from the Wells Street Viaduct?
- (2) Has the Commissioner of Public Works authority to grant permission to remove the tracks as requested in Chicago Surface Lines' letter of May 31, 1945?
- (3) If the tracks are removed, will the Chicago Surface Lines thereafter be liable for payment of any part of the cost of reconstruction, repairs or maintenance of the viaduct?

In reply to question (1):

The following action will be necessary before the Chicago Surface Lines remove their tracks and equipment from the Wells Street Viaduct:

(a) An ordinance should be passed by the city council authorizing removal of the tracks and equipment referred to above and setting forth the conditions under which said removal may be effected. This ordinance should read in substance as follows:

"BE IT ORDAINED by the City Council of the City of Chicago:

Section 1. That consent and permission of the City of Chicago are hereby given to remove the street railway tracks together with poles, wires and other street railway appurtenances from the S. Wells Viaduct at W. Roosevelt Road upon the issuance by the Commissioner of Public Works of the City of Chicago of a permit or permits for the doing of the work of removal, which permit or permits shall be issued only when such work can be done without endangering safe use by the public of said viaduct from which such tracks, poles, wires and other street railway appurtenances are to be removed or when provision has been made for the restoration of the pavement of said viaduct to a condition safe for public travel.

Any such permit shall contain the statement that the permit is granted upon the condition that the City's legal rights shall be preserved to bill and collect from the receivers and trustees of the companies constituting the Chicago Surface Lines for all costs incurred in the restoration of the portions of the pavement of said viaduct from which such tracks, poles, wires and other street railway appurtenances may have been removed.

Section 2. This ordinance shall be in full force and effect from and after its passage.”;

(b) An order should be secured from the Illinois Commerce Commission by the receivers and trustees of the companies constituting the Chicago Surface Lines authorizing the Chicago Surface Lines to remove the tracks and equipment referred to; and

(c) An order should be obtained by said receivers and trustees from the United States District Court authorizing them to remove the tracks and equipment from the S. Wells Street Viaduct.

The last paragraph of section 1 of the above suggested draft of ordinance is in accordance with the policy adopted by the committee on finance and the city council in granting the consent and permission of the city to the removal of certain street railway tracks and facilities from portions of certain streets. See ordinance passed July 8, 1942 (C.J. 7251, 7252) and the amendatory ordinance passed August 5, 1942 (C. J. 7358). The amendatory ordinance added the language which we now suggest. We consider it advisable at this time to follow the policy heretofore adopted.

In reply to question (2):

The Commissioner of Public Works has no authority to grant permission to remove the tracks and equipment under the conditions set forth in Chicago Surface Lines' letter of May 31, 1945. The procedure referred to in subparagraph (a) above should be followed.

In reply to question (3):

We refer you to paragraph 2 of section 1 hereinabove more particularly set forth wherein it is stated

“Any such permit shall contain the statement that the permit is granted upon the condition that the City's legal rights shall be preserved to bill and collect from the receivers and trustees of the companies constituting the Chicago Surface Lines for all costs incurred in the restoration of the portions of the pavement of said viaduct from which such tracks, poles, wires and other street railway appurtenances may have been removed.”

SINGLE GASOLINE TRUCK UNITS

(No. 10900—Alderman, 41st Ward—M. H. F.—May 20, 1946.)

The Municipal Code could be amended to limit the use of combination vehicles in the transportation of flammable liquids.

Citations:

Statute: IRS '45, Ch. 24, Secs. 23-10, 23-27, 23-75, 23, 105. Ch. 38, par. 352, Sec. 2. Ch. 95 $\frac{1}{2}$, pars. 98-239.

Ordinances: Municipal Code, 129-45, 129-51.

Cases: 216 Ill. 114.
358 Ill. 294.

OPINION OF FOREGOING SYNOPSIS

Your letter of April 16, 1946 invites our attention to the fact that several serious fires have been caused by second trailers igniting, and that as late as the Saturday preceding the date of your letter the fire department was called out to extinguish a fire in a burning second tank trailer. In order to guard against possible more serious happenings and possible loss of life you request our opinion as to whether the city council would be authorized to legislate to allow but one trailer over the city streets when carrying highly inflammable cargo.

By a second letter from you dated May 7, 1946 you state that what you desire is an ordinance which will prohibit the transportation of inflammables except in the conventional type truck and which will abolish the use of all types of trailers.

We assume that when using the word "trailers" you intend to include vehicles known as semi-trailers.

Our opinion is that the Municipal Code of Chicago might be amended so as to limit the use of combination vehicles in the transportation of flammable liquids.

By the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, cities in Illinois have been granted broad express powers to regulate the use of streets (Section 23-10), to regulate traffic upon the streets (Section 23-27), to regulate all vehicles conveying loads within their corporate limits (Section 23-53), to regulate and prevent the storage of combustibles (Section 23-75), and to pass and enforce all necessary police ordinances (Section 23-105). Furthermore in the case of *Spiegler v. City of Chicago* (1905), 216 Ill. 114, the Supreme Court sustained the validity of an ordinance of the City of Chicago regulating and licensing the business of oil peddlers. The ordinance containing a provision making it unlawful for any person to spill any flammable liquids or allow any of such liquids to escape to or upon any pavement, or to operate or permit to be operated any tank wagon or other vehicle from which any of said fluids are permitted to escape.

Section 2 of the state act to regulate the storage, transportation, sale and use of gasoline and volatile oils (paragraph 352, chapter 38, Illinois Revised Statutes, 1945) exempts cities having regulatory ordinances upon the subject from the regulations adopted by the State Department of Public Safety pursuant to said act. The City of Chicago is such a city. (*Fligelman v. City of Chicago*, 358 Ill. 294.)

While Section 127 of Article XVI of the Illinois act in relation to the regulation of traffic (Illinois Revised Statutes, 1945, Chapter 95½, paragraphs 98-239) authorizes the use of semi-trailers and permits a truck tractor semi-trailer to draw one trailer, provided the prescribed over-all dimension of the combination of vehicles is not exceeded, this act as its title implies is one regulating traffic, whereas the legislation you propose is designed to neutralize the hazards of fire and explosion met with in the transportation of flammable liquids, which hazards are materially increased when vehicles are operated in combination. As a measure calculated to control such hazards within a populous city, our opinion is that the validity of your legislation would be upheld by the courts, notwithstanding the fact that the statute regulating traffic generally permits the operation of combinations of vehicles.

For your consideration there is transmitted herewith a draft form of ordinance to effectuate what we understand to be your purpose. It consists of amendments to Sections 129-45 to 129-51, inclusive, of the Municipal Code of Chicago.

TAXICAB OWNERSHIP AGREEMENT

(No. 10901—Committee on Local Transportation—J. F. G.—May 23, 1946.)

The Checker Taxicab Company has not violated any City ordinance by entering into private financial and operating agreements with the Cab Sales and Parts Corporation or with any other person or corporation.

Citations:

Ordinances: Municipal Code, Chaps. 195A, 196A.

Case: 297 Ill. App. 617.

OPINION OF FOREGOING SYNOPSIS

We return herewith report of audit of the books of Cab Sales and Parts Corporation and Checker Taxi Company submitted with your letter of May 17, 1946 requesting an opinion as to whether Checker Taxi Company, on the basis of the facts shown by said audit, has violated the contract ordinance with the City of Chicago.

The contract ordinance referred to is the ordinance granting permission and authority for the operation of taxicabs within the city of Chicago and for the appointment of a public vehicle license commissioner passed May 18, 1934, as amended December 22, 1937 and extended to December 31, 1950 by amendment passed June 26, 1945. (Municipal Code of Chicago, Chaps 195A, 196A.)

Section 1 of the ordinance of May 18, 1934 defines the word "licensee" to mean "every person, firm or corporation owning any taxicab and having filed with the city clerk formal written acceptance of this ordinance." By letter from the Public Vehicle License Commissioner dated May 14, 1946 we were informed that Checker Taxi Company holds certificates of title from the Secretary of State for all motor vehicles licensed by him as

taxicabs. Checker Taxi Company (a Delaware corporation) filed its formal written acceptance of the original ordinance and all amendments thereto as required thereby and so became the licensee under the ordinance of May 18, 1934, as amended and extended, with the right to operate taxicabs upon the public streets of the city of Chicago.

The report of audit referred to in your letter of May 17 concerns the financial status of Cab Sales and Parts Corporation and Checker Taxi Company and an analysis of their annual income and operating expenses. It includes a summary of transactions between these companies and their affiliates. In the letter of the auditors transmitting their report, as well as in the comments upon said report, it is said that Cab Sales and Parts Corporation (an Illinois corporation) is operating 1,000 taxicabs under the licenses of Checker Taxi Company. The question submitted for our consideration is whether that statement based upon the financial operations of these companies is proof that Checker Taxi Company has violated the contract ordinance.

It appears that Cab Sales and Parts Corporation and Checker Taxi Company are closely related corporations. The stock of Checker Taxi Company appears to be owned by a partnership under the name of Freimark and Company. This partnership is composed principally of an attorney, an engineer, employees and officers of Checker Taxi Company, Checker Cab Manufacturing Corporation, Transportation Maintenance Corporation, and Cab Sales and Parts Corporation, all affiliates of Checker Taxi Company, either directly or indirectly controlled principally by one Morris Markin. It is obvious that the separation of Checker Taxi Company's operations from Cab Sales and Parts Corporation's operations is solely for legal and financial purposes; that in effect and in fact the two corporations are engaged in a single enterprise in the city of Chicago and that is a passenger transportation business by means of taxicabs.

The report of the auditor discloses that the depreciated value of the cabs here involved is carried as an asset on the books of Cab Sales and Parts Corporation while the books of Checker Taxi Company carry an item of assets under "Intercompany" reading as follows: "Cab Sales and Parts Corporation licensee account (\$1 each)." Total for year 1945 is \$1,000. These facts are not conclusive evidence of the ownership of the cabs by Cab Sales and Parts Corporation. At best, it may be evidence only as between the two corporations that the legal title to the cabs is in one of them and that the other has equitable rights in them.

The City cannot possibly be concerned in the private financial operations between these corporations except as they affect the rates of fare which may be fixed by the City Council. In the relations of these corporations with the public and the City, Checker Taxi Company must be the legal owner of the cabs and they must be operated by or for that company. Cab Sales and Parts Corporation has no authority to operate cabs in its own behalf on the streets of Chicago.

In *City of Chicago v. Dorband* (1938), 297 Ill. App. 617, a taxicab driver employed by a cab company had been arrested and fined for violating the city ordinance which provided that no motor vehicle other than a licensed public passenger vehicle shall be *operated* on the streets of the city of Chicago for hire indiscriminately accepting and discharging such persons as may offer themselves for transportation. He was also charged with *operating* a taxicab without a certificate of inspection of its taximeter as required by the ordinance. The court held that a person driving a cab for another who is the owner thereof does not "operate" the cab within the meaning of the public passenger vehicle ordinance of Chicago; that the term "operating" is synonymous with the term "owning."

It is not disputed that Checker Taxi Company has certificates of title from the Secretary of State to all the cabs, 1,000 in number; that each of

them is licensed by the Public Vehicle License Commissioner in the name of Checker Taxi Company; that Checker Taxi Company in its own name accepted the ordinance of 1934 and all amendments thereto; that each of those cabs bears the name of Checker Taxi Company painted on the rear door of the vehicle as required by ordinance; and that Checker Taxi Company carries insurance on all of the cabs in its own name against damage claims arising from operations of the cabs. Under these circumstances the cab drivers or chauffeurs and other employes engaged in the taxicab operations are employes of Checker Taxi Company in the eyes of the law and that company is responsible to the City and the public for the acts of those employes no matter who pays their salaries or wages. These facts and circumstances are conclusive evidence as between the City and Checker Taxi Company, the licensee, that this company is the owner of the taxicabs operated in its name and that the City and the public can look only to this company to perform its obligations, under the ordinances which it accepted.

Checker Taxi Company, in our opinion, has not violated the ordinance by making a private financial and operating agreement with Cab Sales and Parts Corporation or with any other person or corporation.

CITY WASTE PAPER CONTAINERS

(No. 10942—C. N.—February 13, 1947.)

The City of Chicago has no authority to enter into a contract leasing the sides of waste paper cans as sites for advertising posters.

Constitution: Art. IV, Sec. 22, III. State Const.

Citation: 225 Ill. 470.

OPINION OF FOREGOING SYNOPSIS

We have your letter of February 5, 1947 in which you request an exclusive contract with this city for rental of sides of waste paper cans as sites for advertising posters.

Such a contract cannot be entered into for reasons fully set forth in the case of *The People v. The Clean Street Company*, 225 Ill. 470 (1907), in which it is pointed out that a contract, based upon an ordinance, giving an individual full and complete authority over the outside surface of boxes placed in the streets as receptacles for litter * * * is invalid, as turning over the exclusive use of portions of the street for the benefit of private individuals. The court held such a contract to be in violation of section 22 of article 4 of the state constitution prohibiting special privileges upon public ways.

TICKET SCALPING

(No. 10960—Commissioner of Police—S. R. D.—April 24, 1947.)

Licensees under Chapter 104 of the Municipal Code of Chicago are subject to a revocation of their license if said licensee or manager, officer, agent, or employee of such licensee should sell tickets of admission at a price in excess of the price printed on the ticket or should enter into agreements with ticket brokers or scalpers, through which a large number of tickets are placed in the hands of such persons for resale at prices in excess of the prices printed on the tickets.

Citations:

Statute: IRS '45, Ch. 38, par. 550a.

Ordinances: Municipal Code 36-47, 36-48, 104-3, 104-4.

Cases: 231 Ill. 340-346.

283 Ill. 87.

344 Ill. 297.

363 Ill. 619.

Other reference: U. of Chicago Law Review, Vol. 3, p. 85.

OPINION OF FOREGOING SYNOPSIS

We acknowledge receipt of your letter of February 5, 1947 requesting an opinion on the law concerning "ticket scalping."

The sale of tickets for admission to theatrical exhibitions, shows, amusements and similar entertainment falls into three broad classifications: (a) the sale of tickets by theatres or other places of amusement where the theatrical exhibitions, shows, amusements or other similar entertainment are offered; (b) the sale of tickets by brokers at a location other than at the theatre or other place of amusement where the theatrical exhibition, show, amusement or similar entertainment is being offered, but not on the streets and public highways of the City of Chicago; (c) the sale of tickets by individuals on the public streets and highways of the City of Chicago. We will discuss each classification in the order set forth above.

It is necessary to secure a license before a theatre, opera house, auditorium, hall, park grounds, or other enclosure can offer a theatrical exhibition, show, amusement, or other similar entertainment (Municipal Code of Chicago, Chapter 104, paragraph 104-3.) The ordinance provides that the application for the license shall contain, among other things, the following provision:

"That no ticket of admission shall be issued, sold, or offered for sale by or on behalf of such licensee at a price in excess of that designated thereon, or with knowledge, purpose, or intention that such ticket is to be resold or offered for resale, and no licensee and no manager, officer, agent, or employee of any such licensee shall, directly or indirectly, receive any consideration of any nature whatsoever upon the sale of any such ticket beyond or in excess of the price designated thereon, or directly or indirectly enter into any arrangement, agreement, or understanding for the receipt of any such consideration." (Municipal Code of Chicago, Chap. 104, paragraph 104-4.)

The above quoted section of the ordinance was before the Supreme Court of Illinois for interpretation in the case of *The People v. Thompson*,

283 Ill. 87. The court held that the whole legislative power for the regulation of theatres had been conferred upon the municipality; that the purpose of the ordinance was to prohibit secret alliances with ticket brokers or scalpers which had the effect of requiring some patrons of the theatre to pay higher prices than others for the same accommodations, for the benefit of the licensee—the theatre owner; that the manifest object of the ordinance is to compel impartial treatment of all buyers of tickets by the licensee; and that the ordinance was a valid exercise of the police power “to prevent misrepresentation and fraud in the sale of theatre tickets by the theatre owners themselves and to require fair and impartial treatment of the public.”

Under paragraph 104-3 of the Municipal Code of Chicago the licensee, manager, officer, agent or employee of any such licensee cannot directly or indirectly receive any consideration of any nature upon the sale of such tickets beyond or in excess of the price designated thereon, or directly or indirectly enter into any arrangement, agreement, or understanding for the receipt of any such consideration. The sale of tickets to a ticket broker or scalper must be a bonafide sale and on the same basis as the sale of tickets to the general public. The licensee or manager, officer, agent, or employee of any such licensee cannot have arrangements and agreements with the ticket brokers and scalpers, by which a large number of such tickets are placed in the hands of such ticket brokers or scalpers and sold for prices in advance of the price printed thereon, and the excess above the price printed on the tickets divided between the ticket brokers and scalpers and the licensee or manager, officer, agents, or employee of said licensee. Also the licensee or the manager, officer, agent, or employee of such licensee cannot sell a ticket at a price in excess of that designated on the ticket of admission.

It is our opinion that if the licensee or manager, officer, agent, or employee of such licensee should do any of the things set forth in the preceding paragraph the license could be revoked as provided for in Chapter 104 of the Municipal Code of Chicago.

The second classification is the sale of tickets by ticket brokers at a location other than at the theatre or other place of amusement where the theatrical exhibition, show, amusement or similar entertainment is being offered, but not on the streets and public highways of the City of Chicago. The legislature, in 1907, passed an act prohibiting the sale of a ticket for a price in excess of the advertised or printed rate therefore. In *People v. Steele*, 231 Ill. 340, the constitutionality of the act was attacked. There Edward V. Steele, manager of the Colonial theatre, sold a ticket of admission to Philip Altschul for \$1.50, which was the price printed on the face of the ticket and was the price of admission and Altschul sold the ticket to James Bell, a policeman, for \$2.00 at the desk of the Morrison Hotel where he conducted the business of selling theatre tickets. The court held the act unconstitutional saying (p. 346):

“The statute prohibits the sale of a theatre ticket at a price above the printed rate and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theatre tickets at an advance over the price at the box-office. Such sale is not injurious to the public welfare and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theater. The buyer purchases voluntarily. He is under no compulsion. If the conducting of a theater is a mere private business, there is no reason why the proprietor may not sell the tickets when and where, at what prices and on what terms he chooses.”

Thereafter the legislature, in 1935, passed an act which contained the following provision:

"It is unlawful for any person, persons, firm or corporation to sell tickets for baseball games, football games, hockey games, the theater entertainments, or any other amusement for a price more than the price printed upon the face of said ticket, and the price of said ticket shall correspond with the same price shown at the box-office or the office of original distribution." (1945 Ill. Rev. Stat. Chap. 38, par 550a1.)

In our opinion the legal effect of the above quoted section is the same as the act of 1907 and therefore, under the case of the *People v. Steele*, 231 Ill. 340, the above quoted section of the statute is undoubtedly unconstitutional. A discussion of this act in the *University of Chicago Law Review* (Vol. 3, p. 85) reaches the same conclusion.

It is our opinion that a ticket broker who sells tickets at a location other than at the theatre or other place of amusement where the theatrical exhibition, show, amusement or other similar entertainment is being offered, but not on the streets and public highways of the City of Chicago, can legally sell said tickets at a price in excess of the price printed thereon.

The third classification is the sale of tickets by an individual on the streets and public highways of the City of Chicago.

Sections 36-47 and 36-48 of the Municipal Code of Chicago provides as follows:

"It shall be unlawful for any person to sell, offer or expose for sale, or solicit any other person to purchase tickets for any railroad, steamboat or other transportation line, or any place of amusement, upon any public way or other public place within the district bounded on the north by the Chicago river, on the south by the south line of Roosevelt road, on the east by Lake Michigan, and on the west by the Chicago river."

"No person shall obstruct or encumber any street corner or public place in front of any theater, baseball park or other place of amusement in the city, by lounging in or about the same after being requested to move on by any police officer. Nor shall any person be permitted to remain at any such place having in his possession any tickets for any theater, baseball park or other place of amusement, for the purpose of selling same, or offering the same for sale, in front of, or near any theater, baseball park or other place of amusement in an attempt at speculating in such tickets."

The effect of the above quoted sections of the Municipal Code of Chicago is to prohibit the sale of tickets by an individual on the streets and public highways of the City of Chicago.

In *City of Chicago v. Rhine*, 363 Ill. 619, the question of the validity of an ordinance which prohibited the sale, offering or exposing for sale or soliciting to purchase any article, daily newspaper excepted, on any street, alley or public place was involved. The court held the ordinance valid saying (p. 622):

"The basic purpose of a street is to afford a way for traffic, both pedestrian and vehicular, to the public, and the public is rightfully entitled to the use of such thoroughfare free of all obstructions and impedimenta which tend to delay or obstruct traffic or annoy the public in the use of the streets. (*City of Chicago v. Collins*, *supra*, p. 455; *City of Chicago v. McKinley*, 344 Ill. 297, 304.) It is the duty of the city to maintain its streets in such condition that the public shall at all times have the unobstructed use thereof."

We are of the opinion that sections 36-47 and 36-48 of the Municipal Code of Chicago are constitutional and enforceable. Therefore it is unlawful for a person to "scalp tickets" on the streets of the City of Chicago.

Summarizing the above discussion we are of the opinion: (a) that licensees under Chapter 104 of the Municipal Code of Chicago are subject to a revocation of their license if said licensee or manager, officer, agent, or employee of such licensee should sell tickets of admission at a price in excess of the price printed on the tickets or should enter into arrangements and agreements with ticket brokers and scalpers, by which a large number of tickets are placed in the hands of such ticket brokers or scalpers and are sold for prices in advance of the price printed thereon and the excess above the price printed on the tickets divided between the ticket brokers and scalpers and the licensee or manager, officer, agent, or employee of such licensee; (b) that it is legal for ticket brokers, who sell tickets at a location other than at the theatre or other place of amusement where the theatrical exhibition, show, amusement or similar entertainment is being offered but not on the streets and public highways of the City of Chicago, at a price in excess of the price printed on the ticket of admission; (c) that it is unlawful for an individual to sell tickets on the streets and public highways of the City of Chicago.

TELEGRAPH COMPANY TAX

(No. 10969—Alderman, 14th Ward—A. J. R.—June 6, 1947.)

The City of Chicago has the power to exact reasonable compensation from telegraph companies for the use of city streets and other public property. In determining the amount of this compensation two factors may be taken into consideration. (1) Rental for the use of parts of streets or other public property occupied by poles or other property or equipment. (2) The cost of enforcement.

Citations:

Statute: IRS '45, Ch. 24, 23-10, 23-21, Ch. 134, pars. 1-11, Sec. 4.
Cases: 96 U.S. 1, 125 U.S. 530, 148 U.S. 92, 149 U.S. 465, 174 U.S. 761,
771, 190 U.S. 160, 163, 195 U.S. 540, 574, 209 U. S. 349, 357,
224 U.S. 160, 103 Fed. 31, 107 Fed. 10, 164 Fed. 561, 253 Ill. 346.

OPINION OF FOREGOING SYNOPSIS

We have your letter of May 16, 1947 in which you request opinions upon six questions therein set forth. The second question relates to the power of the City of Chicago to exact compensation from telegraph companies for use of city streets and other public property. This letter deals with that question. Opinions on the other questions are being prepared.

The Act of Congress of July 24, 1866 as amended in 1884, known as the Post Roads Act, authorizes all telegraph companies accepting its provisions to maintain and operate lines of telegraph over the public domain and military and post roads of the United States. 14 Stat. L. 221; U.S.C.A., Title 47, Section 1. Under this Act the term "post roads" embraces the streets of a city. *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1892).

The United States Supreme Court had occasion to consider the scope of the Act in *Western Union Telegraph Co. v. City of Richmond*, 224 U.S. 160 (1912) and speaking through Mr. Justice Holmes, the court said:

"The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 574. It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. *Pensacola Telegraph C. v. Western Union Telegraph Co.*, 96 U.S. 1. It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U.S. 530. But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the States, gives the appellant no right to use the soil of the streets, even though post-roads, as against private owners or as against the city or State where it owns the land. *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 101. S.C., 149 U.S. 465 *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761, 771. *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U.S. 160, 163. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357."

The United States Post Roads Act does not affect the police power of a state nor does it abridge the extensive powers usually vested in municipalities to regulate the use and occupancy of streets. *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380 (1893); *Sunset Telephone and Tel. Co. v. Pomona*, 164 Fed. 561, affirmed 172 Fed. 829 (1909); *Southern Bell Tel. & Tel. Co. v. Richmond*, 103 Fed. 31 (1900); *City of Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, affirming 164 A. 246; *City of Toledo v. Western Union Tel. Co.*, 107 Fed. 10 (1901); *Western Union Telegraph Co. v. City of Richmond*, 224 U.S. 160 (1911).

State legislatures have plenary power over all public highways, including streets within municipalities, which they may exercise directly or confer upon local or municipal authorities the power to exercise. *Springfield v. Postal Telegraph Cable Co.*, 253 Ill. 346 (1912).

Sections 23-10 and 23-21 of the Revised Cities and Villages Act of the State of Illinois (Ill. Rev. Stat., Ch. 24, § 23-10 and § 23-21) confer upon municipalities in the State of Illinois power "to regulate the use of the streets and other municipal property" and to "regulate and prevent the use of streets, sidewalks, and public property for signs, sign posts, awnings, awning posts, telegraph polls (sic), watering places, racks, posting handbills, and advertisements."

The Illinois Act to revise the law in relation to telegraph companies, approved March 24, 1874, (Ill. Rev. Stat., Ch. 134, Paragraphs 1-11) applies to all telegraph companies and provides (Section 4) that "no such company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines along or upon * * * any street, alley, or other highway or public ground, within any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village." That consent must be in writing and recorded in the Recorder's Office of the county.

Municipalities in Illinois may, in the exercise of the authority which has been conferred upon them, demand reasonable compensation for the

space in the streets appropriated to the use of a telegraph company, and the exaction of such reasonable compensation creates no conflict with the Post Roads Act of the United States. *Springfield v. Postal Telegraph Cable Co.*, 253 Ill. 346 (1912) and the cases cited in the court's opinion at page 353.

The reasonable compensation which municipalities have the power to exact, notwithstanding the Post Roads Act of the United States, has been sustained in some instances as a charge in the nature of a rental for the exclusive use of the parts of the streets occupied by poles, and, in other instances, as a charge in the exercise of police power, this charge being in the nature of a permit fee for the enforcement of local governmental supervision. *Springfield v. Postal Telegraph Cable Co.*, 253 Ill. 346 (1912) and the authorities cited by the court at page 354 of the opinion.

It is our opinion that the City of Chicago has the power to exact reasonable compensation from telegraph companies occupying its streets or other public property and that, in determining the amount of this compensation, two factors may be taken into consideration. These factors are: (1) rental for the use of the parts of streets or other public property occupied by poles or other property or equipment, and (2) the cost of the enforcement of local governmental supervision.

SCHOOL AND PLAYGROUND BUSES

(No. 10970—City Comptroller—W. H. S.—June 13, 1947.)

School and playground buses when used as such are not liable under the city ordinance requiring compensation for the use of public ways.

Citation: Municipal Code, Ch. 28.

OPINION OF FOREGOING SYNOPSIS

With your letter of May 21, 1947 you transmit to us for our advice letters to you from Parmelee Transportation Company and Chicago Sight-Seeing Co. Inc. in which they claim exemption from the ordinance of December 17, 1946. A similar letter to you from the Gray Line Sight Seeing Company you transmitted to us with your letter of May 19, 1947.

The ordinance of December 17, 1946, which requires the payment of compensation for the use of public ways in accordance with a specified schedule of rates, is applicable to

“ * * * any person engaged in the business of carrying passengers for hire by any vehicle other than a public passenger vehicle as defined in Chapter 28 of this Code and includes all public utilities for local transportation of passengers within the city and also all intrastate and interstate transportation of passengers into, out of and through the city.”

Expressly excluded from the operation of the ordinance of December 17, 1946 is any public passenger vehicle which, as defined in chapter 28 of the Municipal Code of Chicago,

" * * * is used for the transportation of passengers for hire within the City excepting motor vehicles used as part of and in connection with the operation of a street railway system or public utility in the city."

Parmalee Transportation Company, Chicago Sight-Seeing Co. Inc. and Gray Line Sight Seeing Company transport passengers for hire and their motor vehicles are not used as part of and in connection with the operation of a street railway system or public utility in the city. It follows, therefore, that they properly are licensed under Chapter 28 of the Code and are not included among those public carriers required to pay compensation to the City under the ordinance of December 17, 1946.

You also transmit to us for our advice letters to you from

(a) Clay Judson, Esq. writing in behalf of the Francis M. Parker School. Mr. Judson states that the school, which is not a public carrier and is organized as a non-profit organization, owns a station wagon "which picks up and delivers some of the children attending the school";

(b) Ada M. Setterly, for the Harris Schools, which operates one bus with a seating capacity of 28 persons to transport pupils of the school between their homes and the school;

(c) James J. Cusack, Jr. for the Play Clubs of Chicago, which Mr. Cusack states have station wagons "to transport children to and from their homes to public parks and other places for the purpose of play activities, and the providing of transportation is incidental to the activities of the Club"; and

(d) Sister Mary Gerard for St. Patrick Academy which "operates the buses to pick up school children to take them to and from school."

We think it is clear that the City Council did not intend to charge compensation for the use of the public ways in the case of school and playground buses of the character described.

It is our opinion that such school and playground buses when operated in connection with such schools and playground associations and solely for the purpose of transporting the children to and from their homes and the schools and playgrounds are not liable under the ordinance of December 17, 1946.

BUSES CHARTERED OUTSIDE CITY

(No. 10972—City Comptroller—W. H. S.—June 20, 1947.)

All motor vehicles outside the city which transport passengers for hire to, through and from the City are within the scope of the city ordinance recently enacted which exacts a tax for the use of city streets.

Citation: Municipal Code, Ch. 28.

OPINION OF FOREGOING SYNOPSIS

With your letter of June 10, 1947 you transmit a letter to you from Indiana Motor Bus Company concerning the ordinance of December 17, 1946 and its application to what the letter terms, "charter coach operations." Letters to you on the same subject and which you have referred to us include those from

- (1) Richard C. King, traffic manager of A.B.C. Coach Lines of Fort Wayne, Indiana;
- (2) R. N. Vandermeer, secretary, Oglesby Motor Transportation Company of Oglesby, Illinois;
- (3) S. G. Harrod, for the Peoria Charter Coach Co.;
- (4) Lowell E. Bordner, general superintendent, Indiana Motor Bus Company of Plymouth, Indiana; and
- (5) Philip H. Wagner, chief passenger agent, The Ohio Bus Line Co. of Cincinnati, Ohio.

Letters also have been received by the corporation counsel on the same subject from:

- (1) Claude G. Hines, for Hines Coach Lines of Kokomo, Indiana;
- (2) E. W. Hopping, for Du Page Motor Coach; and
- (3) E. R. Parkhill, general manager, Illini Coach Company of Champaign, Illinois.

The question raised in the above letters is whether buses chartered outside of the city for special trips to Chicago and which do not run on a regular schedule or along predetermined routes are liable under the ordinance of December 17, 1946.

The ordinance in question applies to all "public carriers" other than Chicago Transit Authority, and a "public carrier" is defined by the ordinance as any person engaged in the business of carrying passengers for hire by vehicle other than a public passenger vehicle as defined in chapter 28 of the Municipal Code of Chicago. Inasmuch as chapter 28 is confined to public passenger vehicles which are used for the transportation of passengers for hire *within the city*, it follows that it has no application to vehicles used for the transportation of passengers for hire *into, out of and through the city*. Furthermore, it is specifically stated in the ordinance of December 17, 1946 that it

"* * * includes all intrastate and interstate transportation of passengers into, out of and through the city."

It is clear, therefore, that all motor vehicles from outside the city which transport passengers for hire to, through and from the city are within the scope of the ordinance of December 17, 1946 regardless of whether the trips into Chicago are on regular schedule or are occasional and without advance planning.

Under the ordinance any public carrier is prohibited from using the public ways of the city without first obtaining authorization by ordinance of the city council of Chicago and having obtained the necessary license, permit or authority shall pay compensation according to the specified schedule of rates and in the manner described.

Application for authority to operate on the public ways of Chicago must be filed with the city clerk. The application must set forth the

proposed route, or routes, together with stopping places. It should not be difficult for the public carrier operating occasional charter trips to Chicago to comply with the simple requirements in this regard. He may apply, if he so desires, for permission to operate on several routes and if the city council by ordinance grants him the authority requested he then is at liberty each time he enters Chicago with a charter trip to elect to travel whichever of the authorized routes is desired for the purposes of that particular party.

Without complying with the ordinance of December 17, 1946, including the filing of proposed routes and stopping places, no public carrier engaged in charter coach operations such as are described in the letters before us can operate on the public ways of Chicago. Furthermore, such public carrier can operate only on or along the route or routes described in the ordinance authorizing his operations and can make stops only at the specified stopping places.

SPECIAL PROTECTION SERVICE

(No. 10976—Alderman, 14th Ward—A. J. R.—June 24, 1947.)

The American District Telegraph Company and the Illinois District Telegraph Company may not carry on a watch and fire alarm service in Chicago without a franchise and without payment of compensation to the City.

Citation: IRS '45, Ch. 24, Arts. 49-1, 49-3, 49-12.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your request for an opinion upon the following questions:

"Whether the American District Telegraph Company and the Illinois District Telegraph Company, or any other company, or companies, have the right to carry on a watch service and fire alarm business in Chicago without a franchise and without payment of compensation to the City and

"Whether the City of Chicago has the right to engage in the business of operating a fire alarm and watch service business."

Without a franchise and the payment of compensation to the city the American District Telegraph Company, the Illinois District Telegraph Company, or any other company, does not have the right to carry on in the City of Chicago a watch service and fire alarm business if such service involves the maintenance by the company of poles, wires, conduits or other facilities in, under or over public streets or other public places.

To operate such a business without so maintaining poles, wires, conduits or other facilities would seem to require the use under lease or otherwise of the facilities of other companies holding a proper franchise, lease or permit, such as, for example, the Western Union Telegraph Company or the Illinois Bell Telephone Company. But neither of these companies,

nor any other company holding a franchise, lease or permit from the city has any right to maintain poles, wires or other facilities in the streets of the city for use as an alarm signal system operated by any other company.

We are informed that early in the year 1944 attorneys for the Western Union Telegraph Company and the Illinois Bell Telephone Company appeared before the Utilities Committee of the City Council and denied that they were leasing any specific wires or other facilities in the streets of Chicago for the exclusive use of the American District Telegraph Company or the Illinois District Telegraph Company and stated that these companies were using the facilities of the Telegraph and the Telephone Company in common with other subscribers. If the facts are now as they were then stated to be the Telephone Company and the Telegraph Company are not abusing their rights in the streets and the City has no just cause for complaint. We have no means of ascertaining what the existing status is concerning this matter.

With regard to your second inquiry, whether the City of Chicago has the right to engage in the business of operating a fire alarm and watch service business it is our opinion that any power of the City to do so must be found in Article 49 of the Revised Cities and Villages Act.

Section 49-1 of that Article grants the power "to acquire, construct, own, and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the municipality or its inhabitants, and to contract for purchase, and sell to private persons or corporations the product or service in any such utility."

The term "public utility" as used in Article 49 "means and includes any plant, equipment, or property, and any franchise, lease, or permit, used or to be used (1) for or in connection with the transportation of persons or property, or the conveyance of telegraph or telephone messages;" etc.

Section 49-3 provides that "No municipality shall proceed to acquire or construct any public utility under the provisions of this Article until an ordinance of the corporate authorities providing therefor has been duly passed and submitted to the electors of the municipality and approved by a majority of those voting thereon."

The manner of conducting the referendum is specified in detail in other sections of the Article.

If revenue is the motive for the operation of such a service by the City consideration must be given to Section 49-12 which provides that charges for the service shall be "high enough to produce a revenue sufficient to bear all cost of maintenance and operation, to meet interest charges on the bonds and certificates issued on account thereof, and to permit accumulation of a surplus or sinking fund that shall be sufficient to meet all unpaid bonds or certificates at maturity. Decisions of our Supreme and Appellate Courts leave in doubt the question whether under this provision the rates charged can be made high enough to produce a profit.

USE OF STREETS

(No. 11073—Alderman, 5th Ward—L. L. K.—August 16, 1948.)

A permit is not required by a person to solicit signatures on petitions, political or otherwise.

A permit is not required for a person seeking to persuade citizens to send communications to public officials stating their views and desires on public questions.

No Reference.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of August 10, 1948 in which you ask the following questions:

1. Is a permit required for a person to solicit signatures on a petition, whether a nominating petition or a petition addressed to some public official concerning a public question?

2. Is a permit required for a person to seek to persuade citizens to send postcards, letters, or telegrams to public officials stating their views and desires on public questions?

3. Assuming the same situation as in 2. above, is the fact that the person is accepting donations to defer the cost of the postcards, letters, or telegrams of any significance?

4. Assuming the same situation as in 1. and 2. above, is the answer affected by the fact that the person has set up a card-table or other small stand on the sidewalk or corner and displays a sign to attract people's attention, but without obstructing traffic?

5. Assuming the same situation as in 3. above, how about a card-table or other small stand as in 4.?

Our opinion is as follows:

1. A permit is not required by a person to solicit signatures on petitions, political or otherwise.

2. A permit is not required for a person seeking to persuade citizens to send communications to public officials stating their views and desires on public questions.

3. The answer to number 2 is not altered by the fact that the person is accepting donations to defray the cost of the communications.

4. One who sets up a card-table or other small stand on the sidewalk or corner and displays a sign to attract people's attention to his solicitation of persons to sign petitions, as in your questions 1 and 2, requires no permit. There is no statute or ordinance prohibiting such temporary facilities on the public street and in the absence of any such prohibition the right to it is guaranteed by the first amendment to the United States Constitution relating to the right of the people to petition the government for redress of grievances.

5. We find no law or ordinance applicable to your question number 5. It would seem that the law applicable to number 4 is equally applicable to number 5.

C. ADVERTISING AND HANDBILLS

ADVERTISING ON STREET LIGHTS

(No. 10769—Commissioner of Streets and Electricity—M. H. F.—
February 21, 1944.)

The City cannot enter into any agreement for the sale of advertising space on traffic control signals.

Citations:

Statutes: IRS '43, ch. 24, secs. 23-8 to 23-17, 23-21 to 23-24, secs. 23-27,
 23-28, 23-105.

Cases: 173 Ill. 91, 96.
 225 Ill. 470, 482.
 247 Ill. 204, 215.
 350 Ill. 461.

Other references: 13 Op. Corp. Coun. 127.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date states that there has been proposed to the city that a special compartment be attached to the top of the city traffic signals (stop and go lights), which compartment would be illuminated with the red light of the traffic signal, and used for advertising, and that for using the compartment and signals in the manner indicated the city would be paid compensation by the sponsors of the advertising supplement to the signal. Our opinion is requested as to whether the city can enter into an agreement to sell advertising space on traffic control signals as indicated.

In and by the Revised Cities and Villages Act, Chapter 24, Illinois Revised Statutes, 1943, the city has been granted broad powers over streets. Among such powers are the following: To vacate, lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds (section 23-8); to plant trees upon the streets and other municipal property (section 23-9); to regulate the use of the streets and other municipal property (section 23-10); to prevent and remove encroachments or obstructions upon the streets and other municipal property (section 23-11); to provide for the lighting of streets and other municipal property (section 23-12); to provide for the cleaning of streets and other municipal property (section 23-13); to regulate the openings in streets and other municipal property for the laying, building, repairing, and removing of gas or water mains and pipes, or sewers, tunnels, and drains; and to erect gas lights (section 23-14); to regulate the use of the space over the streets, alleys, other municipal property, and public places of the city, and upon payment of the proper compensation, to be fixed by ordinance, to permit the use of the space more than twelve feet above the level of such streets, alleys, property or places, except for purely private uses (section 23-15); to prevent and regulate all amusements and activities having a tendency to annoy or endanger persons or property on the sidewalks, streets, and other municipal property (section 23-16); to regulate and prevent the depositing of offensive matter in, and to prevent injury to

streets, alleys or other municipal property (section 23-17); to regulate and prevent the use of streets, sidewalks, and public property for signs, sign posts, awnings, awning posts, telegraph poles, watering places, racks, posting handbills and advertisements (section 23-21); to license street advertising by means of billboards, sign boards and signs; and to regulate the character and control the location of billboards, sign boards, and signs upon vacant property and upon buildings (section 23-22); to regulate and permit the exhibition or carrying of banners, signs, placards, advertisements, or handbills on the sidewalks, streets, or other municipal property (section 23-23); to regulate and prevent the flying of flags, banners, or signs across streets or from houses (section 23-24); to regulate traffic and sales upon the streets, sidewalks, public places, and municipal property (section 23-27); to regulate the speed of animals, vehicles, cars and locomotives (section 23-28); and to pass and enforce all necessary police ordinances (section 23-105).

It will be noted that the power conferred by section 23-15 to permit the use of space above the level of streets specifically excepts the use for purely private purposes, and that the authority given by section 23-22 to license street advertising by means of billboards, sign boards and signs refers to the licensing and regulation of street advertising by means of signs upon vacant property and upon buildings. It will also be noted that the powers conferred by the above mentioned grants are those designed to preserve and protect the streets for street purposes and to prevent their use for purely private purposes.

The streets of a city are its arteries for travel and communication. Anything which clogs and impairs circulation therein or which interrupts their free use for their primary purpose of travel and communication, would in our judgment not only be illegal, but would tend to retard the growth and prosperity of the city as a metropolis and hasten its decay. Wisely have the courts of Illinois said that streets are held in trust by a municipality for the benefit of the public and uniformly denied any claimed power of a city to authorize the use of public streets for private purposes.

In the case of *The People v. Wolper* (1932), 350 Ill. 461, a case involving the validity of the curb pump license ordinance, wherein and whereby the city sought to authorize the erection and maintenance of curb gasoline pumps and to exact license fees for their use, the court declared the pumps to be purprestures, or permanent encroachments upon the streets for private use, nuisances per se, and held that they might be abated as such, notwithstanding space was left for the passage of the public. It declared the ordinance void and affirmed the judgment awarding a writ of mandamus compelling the removal of the pumps. On page 466 of its opinion it said:

"Power of a city to authorize the use of public streets for private purposes has been uniformly denied by this court. When a public street is once established all beneficial uses vest in the public. These include the uninterrupted and unobstructed use of any portion or part of such highway. * * * Streets are held in trust by the municipality for the benefit of the public and may not be given away by ordinance."

In answer to the argument that the obstructions were slight and did not seriously impede travel, the court said:

"If it were in each instance to be determined, as a question of fact only, how far such obstruction might encroach upon the highway without becoming a nuisance there would be no certainty in the law, as there would arise in each case the question of fact whether such obstruction was a hindrance to travel and to public use. If one may so obstruct a public highway then may also another, resulting in serious hindrance to the use of the street by the public."

In *Sears v. City of Chicago* (1910), 247 Ill. 204, a case involving sub-sidewalks space, the court on page 215 of its opinion said:

"Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true whether it owns the fee or only an easement. The interest of the public, which is the primary object of the trust, must always be paramount to all other interests. The city cannot grant away the rights of the public, nor can they be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public."

In *Hibbard & Co. v. City of Chicago* (1898), 173 Ill. 91 at page 96 the court said:

"The public streets of a city are dedicated to the public for public use and are subject to the control and management of the city council, but that body has no power to alien or otherwise encumber such streets so long as they are public streets, but must hold them in trust for public uses only. The municipal corporation can grant no easement or right therein not of a public nature, and the entire street must be maintained for public use, hence no individual or corporation can acquire any portion of the street for exclusive private use to the exclusion of the public. The city council has no power to grant such use."

Many other decisions of our Supreme Court announce the same principle.

While the public has a paramount right to the use of the streets in all their parts, and that right is the right of all persons to pass over them freely and without impediment whenever they have occasion to do so, the right is not, however, an absolute right in every person at all times. It is subject to such incidental and temporary or partial obstruction as manifest necessity may require. There is a distinction made between those obstructions and interruptions which are permanent and those which are merely temporary, and in this sense the public right to the unobstructed and uninterrupted use of the streets in all their parts is, therefore, not absolute but relative. Again there is a distinction made between street obstructions which are in aid of travel and traffic control and those which are solely for the private use and benefit of certain individuals. The former comprise curbs, safety islands, lighting fixtures, signs displaying street names and indicating no parking zones, and traffic control structures and signals. These may be permitted as they do not impair the right of the public to the use of the streets, but may be regarded as being in aid of such public use. On the other hand rights in streets for private purposes are condemned in repeated decisions of the courts holding that a municipal corporation can grant no right therein not of a public nature.

It is not seen that it could be seriously contended that a right given to an advertising concern to use the traffic control structures and the stop and go lights thereon for the display of advertising matter for the pecuniary gain of the private concern, would be for the benefit of the public generally, or would be a right to use the streets for their primary purpose of travel.

If it should be argued that the traffic control structures, including the stop and go lights, are already erected in the streets and already constitute physical obstructions, and that the special advertising compartments designed to be attached to the top of the standards and illuminated by the red light of the traffic signal, would not add materially to the size of the physical obstruction, still they would not in our opinion be legal for the reason that their use would be entirely private. It might also be observed

(though this might be a practical matter for the determination of the municipal legislative body) that the display of advertising matter on and in connection with stop and go lights would present a serious interference with adequate traffic control and a likewise serious hazard to safety they would tend to neutralize the very purpose for which the stop and go lights are installed. Surely distracting the attention of motorists and the reading of advertisements would not contribute to safe driving or give protection to pedestrians.

Similar proposals to the one now discussed have been made to the city in recent years concerning which the law department has been compelled to advise municipal officials concerned that they could not be availed of by the city. Opinions of the Corporation Counsel, Volume XIII, page 127.

In the case of *The People v. Clean Street Co.* (1907), 225 Ill. 470, the court had under consideration an ordinance of the City of Chicago authorizing certain of its officials to take such steps as they might deem effective to prevent casting of litter upon the streets, to provide for the erection in the streets of suitable boxes for such litter, and to enter into contracts for the purpose of accomplishing such object. A contract, based upon the ordinance, was made with the Clean Street Company to provide and service the boxes, under the terms of which the company was given control and authority over the outside surface of the boxes to rent or sell the space for advertising purposes at such prices as it might see fit, accounting to the city for a certain per cent of its profits. This contract was later assigned to one Jenney. Suit was filed in the name of the People, upon the relation of the state's attorney against the company and the city, praying that the contract be declared void and that the boxes be declared to be a nuisance and ordered removed from the streets. The lower court dismissed the suit for want of equity and the case was taken to the Supreme Court which latter court reversed the decree. The Supreme Court held the ordinance and contract void, and beginning on page 482 of its opinion said:

"By this contract he was authorized to use the streets and public places of the city for the purpose of advertising the private business of any person or corporation and have exclusive control over the same. The city authorities had no power to grant or delegate any such right or privilege. While the title to the streets and alleys of a city is vested in the city and it has full power and control over them, yet this authority must be exercised according to well established rules of law. The public authorities are merely the custodians or trustees for the public, which must be given the full use and enjoyment of all such streets without obstruction, and without authority of the city council to use or encroach upon them, or authorize others to do so for purely private purposes. By the ordinance and contract the city authorities sought and attempted to turn over the use of certain portions of the street for the exclusive benefit of private individuals, and their action in this regard must be held illegal and void."

No difference in principle is seen between using street litter boxes for private advertising and using stop and go lights and standards for the same purpose, except that the use of the latter would be a greater menace to safety.

Our opinion, therefore, is that any agreement which officials of the city might enter into for the sale of advertising space on traffic control signals pursuant to the proposal outlined in your communication, would be ultra vires and void.

REMOVING BILLBOARDS

(No. 10891—Budget Director—A. F. G.—March 8, 1946.)

The Commissioner of Public Works has the authority to order the removal of a billboard erected unlawfully on part of a city street.

Citation: Municipal Code, 8-13, 34-2.

OPINION OF FOREGOING SYNOPSIS

We have your letter of February 27, 1946, calling attention to a billboard erected at the south east corner of S. Michigan avenue and E. 103rd street, which is alleged to be erected partly on city property, i.e. on E. 103rd street, a public street. You ask what steps can be taken to secure the removal of that section of the sign now on city property.

A billboard erected on a public street is an unlawful encroachment and obstruction in such street. The commissioner of public works has been entrusted with the general control of the streets of the city and also has been given broad general power and authority to remove all obstructions in such streets.

Section 8-13 of the code provides:

"The commissioner of public works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any public way in the city."

Section 34-2 is in part as follows:

"The commissioner of public works is hereby authorized to order any article or thing whatsoever which may encumber or obstruct any public way, public landing, wharf or pier within the city to be removed. If such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, the commissioner of public works shall cause the same to be removed to some suitable place, to be designated by the said commissioner. The owner of any article so removed shall be subject to a penalty of not more than ten dollars, in addition to the costs of such removal."

In view of the provisions of the ordinances referred to above, we are of the opinion that the power to remove the billboard unlawfully erected in E. 103rd street as aforesaid is vested in the commissioner of public works.

OVER-HANGING SIGNS

(No. 11000—Commissioner of Buildings—A. F. G.—October 16, 1947.)

Gasoline station over-hanging signs and pump-lights come within the provisions of the Municipal Code regarding electric signs.

Citations: Municipal Code 58.1-2.

Coun. J. p. 6855, Jan. 10, 1947.

OPINION OF FOREGOING SYNOPSIS

We have your letter of September 9, 1947 which is as follows:

"We are in receipt of a communication from the Sinclair Refining Company returning a number of warrants for collection covering projecting signs at various gasoline filling stations, stating that in their opinion the ordinance passed on July (January) 10, 1947, as found in Council Proceedings, page 6855, does not cover their particular type of sign and, therefore, the warrants transmitted are not proper.

The signs in question include not only those which are on metal, advertising a particular product being illuminated by flood lights directed thereon, but also those types of glass globes which are mounted upon gasoline pumps and have electrical illumination on the inside thereof. In fact, all various illuminated placards or announcements which are normally found in gasoline filling stations.

In order that this department may determine whether the position of Sinclair Refining Company is correct in returning unpaid these warrants for collection for electrical inspection, will you please advise whether their interpretation is accurate."

In their letter objecting to the warrants the Sinclair Company says: "Our signs do not come under the category of 'Electric Signs' as defined in Chapter 58.1-2 of the City Code. There are no electric fixtures, sockets, neon tubing or wiring on any part of our signs." But they do not describe their signs.

The definitions in question are:

"58.1-2 Definitions.) An electric sign is hereby defined as a box made of metal or incombustible material and constructed as described in Section 58.1-13 in which has been installed all or any part of the equipment necessary to operate all or any part of the gaseous tubing or electric lamps contained thereon or therein.

A signboard is hereby defined as a structure with a vertical or nearly vertical surface erected for the outdoor display of notices of any kind, and may be illuminated by lights from an electric source attached to the structure or a source removed."

We have viewed the signs displayed at various filling stations including Sinclair stations as well as those operated by other oil companies. We find that at practically every station there is a flat sign, varying in size, sometimes square, sometimes round or oblong on which is displayed the name of the company. These signs are supported by standards from which arms protrude to which are attached electric lamps reflecting on the sign. We think these clearly are within the definition of "signboards" as shown above. Nearly every pump has a glass box or globe on which is painted the name of the company or the type of product sold therein, which are illuminated by electricity from within the globe. It is our opinion these come within the definition of "electric sign" quoted above. The fact that these globes are attached to the pump rather than on a separate post or standard does not change their character as electric signs.

Unless the company can show that the signs objected to clearly are not within the definitions of electric signs or illuminated signboards you should insist on the payment of the warrants.

D. TRAFFIC

TIE-ON SUMMONSES

(No. 10754—Chairman, Committee on Traffic and Safety—M. H. F.—October 8, 1943.)

Inasmuch as the Appellate Court has approved the use of tie-on summonses for parking violations there can be no objection to extending their use for Inspection Lane Ordinance Violations.

Citations:

Ordinances: Mun. Code: 27-34.2.

Cases: 319 Ill. App. 623.

Other references: 20 Op. Corp. Coun. 230.

OPINION OF FOREGOING SYNOPSIS

You have asked us to consider the question whether a valid amendment might be made to the Inspection Lane ordinance by providing for the use of tie-on appearance notices of violations similar to those authorized by section 27-34.2 of the Municipal Code of Chicago in enforcing the parking ordinance.

In an opinion given you as Chairman of the Subcommittee on Traffic and Public Safety May 23, 1939 (Opinions of the Corporation Counsel, Volume XX, page 230) in connection with the then proposed use of the tie-on notice for parking ordinance violations, we expressed the view that while legal service of summons for traffic violations could not be accomplished by attaching a notice to an unattended motor vehicle, the use of the notice as a notice of violation was both practical and legal. An ordinance was thereupon passed authorizing the use of such notices, which later became the subject of litigation. In the case of *City of Chicago v. Crane* (1943), 319 Ill. App. 623, the Appellate Court of the First District of Illinois upheld the validity of the ordinance and sanctioned the use of the tie-on notice.

No material difference is seen in the use of a tie-on notice to notify violators of the Inspection Lane ordinance from its use under the Parking ordinance. Because the Appellate Court has approved the use of the notice as a means of enforcing one of the city's traffic ordinances our opinion is that the courts would extend their approval to its use in enforcing another traffic ordinance.

Accordingly we have prepared and there is herewith submitted for your consideration draft form of ordinance amending chapter 27 of the Municipal Code of Chicago, which is designed to permit the use of the tie-on notice in enforcing compliance with the Inspection Lane Ordinance.

ABANDONED VEHICLES ORDINANCE

(No. 10828—Commissioner of Police—M. H. F.—December 20, 1944.)

Nothing in the Soldiers' and Sailors' Relief Act exempts a soldier owner of a vehicle from the provisions of the city's abandoned vehicles ordinance, relative to the right of the city to collect towing and storage charges from the owner of a motor vehicle.

Citations:

Statutes: Soldiers' and Sailors' Relief Act, title 50, U.S.C.A.

Ordinances: Municipal Code, 27-94.6.

OPINION OF FOREGOING SYNOPSIS

Your communication of December 1, 1944 transmits a request for an opinion from the Captain of the Stolen Auto section relative to the right of the city to collect towing and storage charges from the owner of a motor vehicle under section 27-94.6 of the Municipal Code of Chicago, in a case where the owner of the vehicle is serving in the Armed Forces of the United States.

Under the facts and circumstances recited in the Captain's communication we see no reason why the charges may not be collected. We find nothing in the Soldiers' and Sailors' Relief Act, U.S.C.A., Title 50, which in our opinion exempts the soldier owner of the vehicle in question from the provisions of the city's abandoned vehicles ordinance. The towing charge doubtless represents an "out of pocket" expense to the city and in our opinion may not be waived. The storage charges, however, could be waived provided the city council were to pass an ordinance authorizing their waiver. Perhaps it would be the generous and proper thing to do in this case as an aid to a serviceman. A draft form of ordinance suitable for use in effectuating this result is enclosed herewith.

SPEED LIMIT SIGNS

(No. 10834—Commissioner of Streets and Electricity—A. F. G.—January 26, 1945.)

Under the Municipal Code the Commissioner of Streets and Electricity may legally erect signs indicating the speed he has determined to be reasonable and safe.

Citations:

Statutes: Uniform Act Regulating Traffic on Highways, Secs. 49a, 50a.

Ordinances: Municipal Code, ch. 27.

OPINION OF FOREGOING SYNOPSIS

Your letter of January 24, 1945 is as follows:

"Traffic engineering studies indicate that high speeds have been contributing factors in producing accidents on Vincennes Avenue between 87th Street and 95th Street.

The speed in this section, in accordance with our interpretation of the State Law, is 35 M.P.H. We believe that 25 M.P.H. would be a safe and reasonable speed for motorists to travel and we would like to post signs to that effect.

Will you please inform us if we may legally erect these signs."

The "Uniform Act Regulating Traffic on Highways" does not provide a speed limit measured in miles per hour for motor vehicles of the first division. Section 49 (a) of that act does, however, set up a basic rule which is as follows:

"No person shall drive a vehicle of the first division as described in Article I of this act, upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

The section then provides that if the rate of speed of any such motor vehicle where the same passes through certain designated districts in a city, village or incorporated town, exceeds a certain designated number of miles per hour, varying according to the congested nature of the district, then such rates of speed shall be "*prima facie* evidence" that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb, or injure the property of any person.

By Section 50 (a) Local Authorities are given power with respect to streets under their jurisdiction to alter *prima facie* limits fixed in Section 49. If the Local Authority after investigation determines that the *prima facie* speed permitted under this Act at any intersection is greater than is reasonable or safe under the conditions found to exist at such intersection, it may determine and declare a reasonable and safe *prima facie* speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersection.

Your investigation discloses that the *prima facie* speed permitted at this intersection is greater than is reasonable or safe under the conditions found to exist at such intersection. In such case the Local Authorities have power under Section 50 (a) referred to above to determine and declare a reasonable and safe *prima facie* speed limit thereat, which shall be effective when appropriate signs giving notice thereof are erected at such intersections.

We advise you, therefore, that, by the authority vested in you by Chapter 27 of the Municipal Code of Chicago adopted pursuant to this statute, you may legally erect the signs indicating the speed you have determined reasonable and safe.

SPEED LAWS

(No. 10866—Chairman, Committee on Traffic and Safety—A. F. G.—November 14, 1945.)

Under the power granted by statute the local authorities of the City of Chicago may determine and declare a reasonable and *prima*

facie speed limit for every section of the city. Such speed limits shall become effective when appropriate signs giving notice thereof are erected. In no event shall the posted speed limit exceed 45 miles per hour.

Citation:

Statute: Uniform Act Regulating Traffic on Highways, secs. 16, 26, 49 and 50.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 31, 1945, in which you refer to a meeting of your committee, at which was discussed the matter of speed regulations on streets in business districts, residence districts and suburban districts. You further say:

"It was pointed out at the meeting that in certain instances, where arrest tickets are served for violation of speed regulations, there is doubt in the mind of the motorist as to which of the districts is the one in which he was driving and consequently doubt as to the speed limitation.

Following discussion, the Committee directed that you be requested to advise it as to the powers of the City to impose speed limits on the streets of Chicago and to furnish it with an explanation of the definitions of 'business district', 'residence district', and 'suburban district', under the laws of the State of Illinois."

Section 26 of the Uniform Act Regulating Traffic on Highways defines the powers of local authorities with respect to streets and highways under their jurisdiction. No power is granted to local authorities by that section to regulate speed of vehicles except in public parks.

Section 49 (a) of the same Act provides:

"49. Speed restrictions. (a) No person shall drive a vehicle of the first division as described in Article I of this Act, upon any public highway in this State at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. If the rate of speed of any motor vehicle of said first division, operated upon any public highway in this State where the same passes through the business district of any city, village or incorporated town exceeds twenty (20) miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this State where the same passes through the residence district of any city, village or incorporated town exceeds twenty-five (25) miles an hour, or if the rate of speed of any such motor vehicle operated on any public highway in this State in a suburban district, exceeds thirty-five (35) miles an hour, such rates of speed shall be *prima facie* evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

You ask us to furnish an "explanation" of the definitions of "business district", "residence district", and "suburban district" as the same are defined in the Uniform Act. These terms are defined in this Act in section 16 as follows:

"Business district. (a) The closely built up business portion of any city, village or incorporated town.

(b) Residence district. The closely built of residence portion of any city, village or incorporated town.

(c) Suburban district. That portion of any city, village or incorporated town other than the closely built up business and residence districts".

We think the legislature in defining these terms and in using the words "The closely built up business portion" and "The closely built up residence portion of any city", had in mind the conditions obtaining in the typical small municipality rather than the more complex situation prevailing in a city like Chicago. In the smaller cities the built up business portion is generally a section where the entire business of the community is segregated, while in Chicago there are numberless such business areas scattered throughout the city. The speed restrictions referred to above apply as well to these scattered business sections of Chicago as well as to the well defined business centers of the smaller cities.

However, by section 50 of this Act the local authorities are given power to vary the *prima facie* speed restrictions provided in section 49 in the following manner:

"When local authorities may alter *prima facie* limits. Whenever the local authorities in cities exceeding 500,000 in population shall determine upon the basis of an engineering and traffic investigation that any *prima facie* speed upon any street, under its jurisdiction, as hereinbefore set forth, is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a street, said local authorities shall determine and declare a reasonable and safe *prima facie* speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the street, but in no instance shall the speed exceed 45 miles per hour."

This is the only power the city has in the matter of speed regulation on streets and highways under its jurisdiction. We are of the opinion that under the power granted by this section the local authorities of the City of Chicago may, after the investigation required by the Act, determine and declare a reasonable and safe *prima facie* speed limit for every section of the city regardless of the character of the area, which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the street. The only limitation is that no speed shall exceed 45 miles per hour.

SUSPENDED TRAFFIC SIGNALS

(No. 10908—Chairman, Finance Committee—R. J. N.—August 21, 1946.)

The City of Chicago does not have the authority to install single traffic control signals suspended in the middle of intersections within the corporate limits of the City of Chicago without the approval of

the Department of Public Works and Buildings of the State of Illinois.

Citation: IRS '45, Ch. 95½, pars. 98 to 132.

OPINION OF FOREGOING SYNOPSIS

Your recent letter requests an interpretation of the law with respect to the right of the City of Chicago to install traffic control devices suspended at the middle of an intersection rather than on four separate posts at city street corners.

The city's right to install traffic control devices on its streets is limited by the Uniform Act of the State of Illinois regulating traffic on highways (Ill. Rev. Stat. 1945, ch. 95½, pars. 98 to 132) which provides in part as follows:

"* * * Section 28. Department to adopt sign manual. The Department shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this Act for use upon highways within this state. * * *"

"* * * Section 30. Local traffic-control devices. Local authorities in their respective jurisdiction shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this Act or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the State manual and specifications. * * *"

By definition the Department referred to is the Department of Public Works and Buildings of the State of Illinois (sec. 8b) and street or highway is defined as:

"Sec. 12a. The entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic." The manual referred to above provides in Part 3, Section 17 that:

"* * * Normally there shall be two signal faces on each corner of the intersection, arranged to give indications from the near right, and far left corners to traffic approaching the intersection on each street. * * *"

The manual provides for deviation from the rules laid down therein only if permission for such change has previously been submitted to and approved by the Department of Public Works and Buildings. If approval is given, the design then is considered as conforming to the provisions of the manual (Introduction).

From the above quoted provisions of the statutes and the State manual for Uniform Traffic Control Devices, we are of the opinion that the City of Chicago does not have the authority to install single traffic control devices in the middle of intersections within the corporate limits of the City of Chicago without the approval of the Department of Public Works and Buildings of the State of Illinois. This conclusion applies regardless of the source of the funds used in erection of the devices.

MOTOR COACH REGULATIONS

(No. 11033—Commissioner, Streets and Electricity—J. J. D.—February 19, 1948.)

Motor-coach busses operating under certificates of convenience and necessity must still obey city traffic rules and would be subject to fine if they violate the "no left turn" regulations.

Citations:

Statutes: IRS '47, Ch. 24, Secs. 65 to 65.17.
Public Utilities Act. Sec. 81.
Case: 378 Ill. 508.

OPINION OF FOREGOING SYNOPSIS

We have your letter of February 13, 1948 inquiring as to the City's position with reference to motor bus companies who have been granted a certificate of convenience and necessity issued by the Illinois Commerce Commission operating in violation of "No Left Turn" regulations.

The Supreme Court of this state in the case of *City of Geneseo v. Illinois Northern Utilities Co.*, 378 Ill. 508 (1941) after referring to sections 65 to 65.17 of Article 5 of the Cities and Villages Act (Illinois Revised Statutes, 1939, chapter 24, p. 383) including particularly section 65.8 which authorizes municipalities "to regulate use of streets" said:

"These several powers have been held to authorize cities and villages to regulate and control the use of their streets and this included the right to grant to or withhold that use from utilities. (citations) * * *

It is noted, however, that nowhere is there to be found in the act express power taking from the City the 'right to permit * * * or prohibit the use of any street, alley or public place within a city.' (p. 521). * * *

No language, specific or otherwise, is found in the statute giving the Commerce Commission power or authority to superintend, regulate or control the streets of a city, or suspend its power to license or prohibit the occupancy thereof. On the other hand, there are several provisions in the Public Utilities act which indicate the absence of such intention. (p. 522) * * *

Cities are authorized and empowered by the statutes to do many things that affect its streets, highways and public places. Among these many powers as found in the Cities and Villages Act, or construed by this court to be involved within such powers are the right * * * to regulate traffic and parking * * * to select streets for through or local traffic * * *. These, and many others, are all in addition to the powers to permit or refuse the occupancy of its streets by franchise or license, and would be seriously affected or destroyed if the Commerce Commission should be held to have the exclusive right of control of the use of streets by a public utility." (p. 530-531).

The court further in referring to section 81 of the Public Utilities act quoted from that section as follows:

"Nothing in this act shall be construed to limit or restrict the power now or hereafter granted to cities to pass ordinances for the protection of the public health, safety, comfort and general welfare, or governing the regulation, control or occupancy of streets, highways and public property within the city, etc." (p. 523)

We note the statement in your letter that "In the interest of traffic safety and facilitation, the City of Chicago has by ordinance instituted 'No Left Turn' regulations at many street intersections."

In view of the fact that the declared purpose of the ordinance is to promote traffic safety and as the above case is the latest expression of our Supreme Court concerning the general basis of your inquiry, we are of the opinion that the City should take the position that its power to regulate traffic in its streets, as represented by "No Left Turn" regulations, is paramount to any authority represented by a certificate of public convenience and necessity issued by the Illinois Commerce Commission.

CHAPTER X — PUBLIC UTILITIES

A. RAILROADS

“EL” STATIONS

(No. 10796—Commissioner of Buildings—A. F. G.—June 23, 1944.)

The Building Department has no jurisdiction over the passenger loading platforms of the Rapid Transit Company. The manner and time of making extensions on the platforms is solely within the jurisdiction of the Illinois Commerce Commission.

Citations:

Statute: Sec. 50, Public Utility Act.

Cases: 316 Ill. 425.

318 Ill. 402.

331 Ill. 360.

337 Ill. 200.

348 Ill. 193.

355 Ill. 65.

378 Ill. 506.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of April 24, 1944, in which you inquire whether the City of Chicago or the Illinois Commerce Commission has jurisdiction over the erection of an addition to a passenger loading platform at the Fullerton Avenue station of the Chicago Rapid Transit Company.

It has been held in several cases that the passage of the Public Utility Act placed in the hands of the Illinois Commerce Commission power to regulate public utilities and withdrew from municipalities similar power previously vested in them in respect to utilities by the Cities and Villages Act. *Village of Atwood v. C. I. & W. R. R. Co.*, 316 Ill. 425, (1925); *Northern Trust Co. v. Chicago Railways Co.*, 318 Ill. 402 (1925); *Chicago, North Shore and Milwaukee R. R. Co. v. City of Chicago*, 331 Ill. 360, (1928); *Chicago Motor Coach Co. v. City of Chicago*, 337 Ill. 200, (1930); *City of Chicago v. Chicago Great Western Railroad Co.*, 348 Ill. 193, (1932).

In each of the above cases the court held there was a specific grant of authority to the Commerce Commission giving it jurisdiction over something which before that time had been within the jurisdiction of a city or village. There was no doubt about a conflict of authority. The provisions of the statutes were in direct opposition to each other, and under the well-settled principles of statutory construction the powers granted the Commerce Commission became the dominant ones without a specific repeal of the conflicting statutory powers granted to cities and villages. The legal proposition to be adduced from these decisions, is that wherever there is specific power or authority granted to the Commerce Commission, which is in opposition to a like or similar power granted the city or village the former will prevail and the latter, without express repeal, will become ineffective. *City of Geneseo v. Illinois Northern Utilities Co.*, 378 Ill. 506 (1941).

In *City of Chicago v. Alton R. R. Co.*, 355 Ill. 65 (1934), our Supreme Court, in holding that the city's power to inspect certain buildings and elevators, the property of the railroad company, and to collect an inspection fee therefore was not withdrawn by the Public Utility Act, distinguished its previous rulings and held that the language of the Public Utility Act shows "that the legislature did not intend to confer upon the Commerce Commission exclusive control over all equipment and property owned by public utilities, and that cities may exercise police powers over such property as has no distinctive public utility feature or use where this control will not tend to defeat the objects of the Public Utility Act."

The buildings in question were used for the storage of records, for general offices, a freight house and three of them were occupied in whole or in part by tenants. In discussing the uses of these buildings and their relation to the public service character of the railroad the court said:

"The mere fact that a building is used for one branch of a public utility's business, such as storage of records, does not so impress a public use upon the building as to take its control and regulation from the city and place it under the Commerce Commission. The service of the railroad will not be impaired by subjecting its record or other buildings to an inspection designed, in part at least, to prevent fire hazards. The uses of the property in question are not such uses as are contemplated by the legislature in the provisions for control and regulation contained in the Public Utilities act, either as to the buildings or as to the elevators."

In the instant case the jurisdiction involved is over an extension of a passenger platform at one of the company's stations which is a part of the existing plant of the Company and is used directly in facilitating transportation which is the main purpose of the utility company.

Section 50 of the Public Utility Act provides:

"Whenever the commission, after a hearing had upon its own motion, or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility * * * ought reasonably to be made * * * to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, * * * in the manner and within the time specified in said order."

In view of the foregoing section and the holding of our court in the cases first cited that the police power of the city has been withdrawn by the passage of the Public Utility Act over matters that are closely connected with public utility service, we are of the opinion that your department has no jurisdiction to interfere with the extension of this platform and that the manner and time of making this extension is solely within the jurisdiction of the Illinois Commerce Commission.

By a contract ordinance passed January 15, 1894, the Northwestern Elevated Railroad Company, now the Chicago Rapid Transit Company, was authorized to construct, maintain and operate an elevated railroad in certain streets in Chicago and by section 7 of that ordinance was given permission and authority to construct and maintain all proper stations, platforms and depot stations and to connect the same with streets by means of stairs, stairways, elevators, landing places, etc. Plans and specifications of such depots, platforms and stairs were required to be approved by the Commissioner of public works. (Hoover's Special Ordinances 1915, p. 1286.)

From the decisions cited above and the provisions of the contract ordinance, we are of the opinion that your department has no jurisdiction in the premises.

VIADUCT LIGHTS

(No. 11030—Commissioner, Public Works—J. J. D.—February 17, 1948.)

The Illinois Commerce Commission has exclusive jurisdiction over railway viaduct lights and an ordinance compelling railroads to install same would be unenforceable by the City.

OPINION OF FOREGOING SYNOPSIS

Replying to your communication regarding unlighted girders and trusses protruding above the roadway in viaducts over railroads within the city limits and your request for our opinion as to whether the draft of the code as amended contained in your communication can be enforced without the necessity for action before the Illinois Commerce Commission, also whether this is the proper procedure to follow, we respectfully refer you to the opinions of this office, submitted in response to a similar request from your office bearing date of May 4, 1931 and April 5, 1933.

In the opinion of May 4, 1931 we stated: "The power to compel railroads to use safety devices such as black and white stripes and signal lights on viaduct structures in the streets, is vested exclusively in the Illinois Commerce Commission."

Our opinion of April 5, 1933, after deciding that the Illinois Commerce Commission had exclusive jurisdiction, stated: "The City should request the railroad to install the safety markers and if it refuses the City should petition the Illinois Commerce Commission to order the railroad to install the markers."

The foregoing statements are applicable unless there is an unexpired contract between the City and the Railroads affecting any particular viaduct or underpass. If such contract obligates any railroad to install and maintain visible safety devices and to install and maintain lighting fixtures and maintain lights on any viaduct the obligation may be enforced without an ordinance by demand, and upon failure of the Railroad to comply, the City may do what is necessary in regard to the subject and recover the expenses from the Railroad.

The above opinions can be supported by extensive legal citations which may be had upon request. We see no necessity for setting them forth at length in this opinion. We deem it sufficient to say that the law concerning the subject matter of your communication has not changed since 1931 and 1933.

In our opinion, therefore, the draft of the ordinance as submitted would not be enforceable by the City for the purpose indicated in your inquiry and the reasons stated above.

RAILROAD LOCOMOTIVES

(No. 11061—Chairman, Committee on Railway Terminals—J. J. D.—June 18, 1948.)

The City of Chicago does not have the authority to pass an ordinance that would require railways operating in Chicago to replace, within a specified time, their coal-burning locomotives with locomotives that would not emit noxious fumes, smoke or cinders.

Citations: 316 Ill. 425.
318 Ill. 412.
324 Ill. 494.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your request for an opinion as to the power of the city council to pass an ordinance that will require railways operating in Chicago to replace, within a specified time, their coal-burning locomotives with locomotives propelled by a motive power that will not produce noxious fumes, smoke or cinders.

We are of the opinion that the city council would have no such power.

In the case of *Northern Trust Co. v. Chicago Railways Co.*, 318 Ill. at page 412, our Supreme Court said:

"the power of the city over the subject of the regulation of the equipment of public utilities ceased to exist when that act (Public Utilities act) became effective on January 1, 1914. * * * When the first Public Utilities act came into force on January 1, 1914 the power of the city over the subject matter of that act ceased to exist and it could not therefore pass new ordinances or enforce existing ordinances with reference to matters within the exclusive jurisdiction of the Public Utilities Commission. The power to enforce proceeds from the present or existing power or authority to enact or to provide. A municipality cannot be said to possess the power to enforce an ordinance concerning a subject upon which it has lost the power to pass an ordinance. * * * Section 49 provided that whenever the Commission after a hearing should find that the *equipment* of any public utility was * * * improper or inadequate, it should determine, and by its order * * * fix the safe, proper or adequate equipment to be furnished or employed."

To the same effect are *Village of Atwood v. C. I. & W. R. R. Co.*, 316 Ill. 425 of the *City of Witt v. C. C. C. & St. L. Ry. Co.*, 324 Ill. 494. In the latter case the Supreme Court held that the Public Utilities act of 1921 has taken from cities and villages the power theretofore exercised by them with reference to regulating the operation of railway trains and such power is now vested in the Commerce Commission.

It is clear from the foregoing that the Commerce Commission has exclusive jurisdiction over the subject matter of your inquiry.

B. CHICAGO TRANSIT AUTHORITY

SAFETY ISLAND CONSTRUCTION

(No. 10879—Chairman, Finance Committee—W. H. S.—December 18, 1945.)

The phrase "purchase and construction of street railways by said City, in the ordinances creating the Traction Fund relates only to the construction or acquisition of local transportation facilities. It would not be proper to use the Traction Fund for the purpose of constructing or maintaining safety islands or loading platforms in the streets.

Citations:

134 Fed. 2d. 682.
245 Ill. 598.
349 Ill. 304.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of yesterday to the corporation counsel stating that in the consideration of the 1946 budget the question was raised as to whether the construction of safety islands and loading platforms located in the streets, built for the benefit and safety of pedestrians boarding or leaving the Chicago Surface Lines cars, could be charged to the Traction Fund.

Under the so-called Settlement Ordinances passed February 11, 1907 the traction companies constituting the Chicago Surface Lines were directed to pay to the City, 55 per cent of their net receipts each year. The fund thus accumulated constituted compensation for the use of the City's streets by the traction companies. It was ordered deposited to the credit of the City as "a separate fund to be kept and used for the purchase and construction of street railways by" the municipality. The accumulated fund is held in trust to be expended for the specific purpose defined by the Supreme Court of Illinois as including elevated, surface and underground railways, (see *Barsaloux v. Chicago*, 245 Ill. 598) and all preliminary and incidental work necessitated by or involved in such purchase and construction. (*People v. Chicago*, 349 Ill. 304). (See *Tilney et al. v. City of Chicago*, 134 F. 2d, 682 decided by the United States Circuit Court of Appeals, for the Seventh Circuit, on April 16, 1943.)

In the *Barsaloux* case the court further held that the power to construct necessarily includes the power to take the preliminary steps looking toward the construction of a subway. In that case expenditures for investigation into the desirability of constructing subways was under attack.

In our opinion the expression "purchase and construction of street railways by said City" in the ordinances creating the Traction Fund relates only to the construction or acquisition of local transportation facilities title to which will be in the City of Chicago Transit Authority.

We therefore are of the opinion that it would not be proper to use the Traction Fund for the purpose of constructing or maintaining safety islands or loading platforms in the streets, but the cost of such work should be paid out of whatever funds may be otherwise available for the construction or reconstruction of streets.

C. T. A. RIGHT OF WAY

(No. 11015—Mayor—J. G. S.—January 8, 1948.)

It is the duty of the Chicago Transit Authority under the law to keep its street car right-of-ways clean at its own expense.

Citations:

Ordinance: Municipal Code, 188-21.

Cases: 200 U.S. 561.

25 Ill. 123.

73 Ill. 541.

199 Ill. 259.

267 Ill. 19.

278 Ill. 591.

324 Ill. 618.

OPINION OF FOREGOING SYNOPSIS

In pursuance to the conversation between you and Mr. William H. Sexton had on September 29, 1947 relative to the cleaning of the street car right-of-way in the city streets and in further discussion of the question of Hon. Benjamin S. Adamowski, Corporation Counsel, contained in an office memorandum to Mr. William H. Sexton dated October 17, 1947: "What is the effect of the new Transit Authority on the use, liability and maintenance of city streets used by it?" we submit the following:

(1) Section 188-21 of the Municipal Code of Chicago provides:

"Every person operating any street railroad track on and along the surface of any public way of the city shall remove all dirt, snow and other accumulations from so much of the surface of the public way as lies between the two outermost rails of such tracks and also from such additional surface in width as may be prescribed in any street railroad ordinance by virtue of which he is operating the street railroad. All such dirt, snow and other accumulations shall be removed entirely from and out of such public way at least once each week and as much oftener as the commissioner of streets and electricity shall in writing direct. Such dirt, snow and other accumulations shall be removed and disposed of in accordance with the provisions of this code and subject to the rules and regulations of the department of streets and electricity.

Any person operating a street railroad upon or along the surface of any public way in the City, that shall refuse or neglect to clean any part of a public way as required by this section, shall be fined not less than fifty dollars nor more than two hundred dollars for each offense."

(2) In *City of Chicago v. Union Traction Company*, 199 Ill. 259 (1902) the court passed upon the validity of sections 1716 and 1717 of the

then revised Municipal Code which in substance are similar to section 188-21 of the present Municipal Code of Chicago. At page 264 the court said:

"* * * There is, it is conceded, a general police power possessed by the city by which the traction company and all persons, natural or artificial, may be subjected to such reasonable restrictions and regulations as are found to be proper and requisite to secure the health, comfort and convenience of the people. The ordinance, it is urged by counsel for the city, should be sustained as a legitimate exercise of the police power. * * *"

(pages 268 *et seq.*)

"* * * The public health and comfort required the street to be cleansed of the dirt and filth which 'accumulated' on the pavement between the tracks of the railway and about the rails of such tracks, and the exercise of the police power to that end devolved upon the city as a duty.

It does not seem unreasonable that the city should require the traction company to clean and render healthy that portion of the street occupied by the tracks of the road, under the circumstances of the case. In order to secure the public health and comfort the property of individuals and corporations may alike be subjected to reasonable restrictions and burdens. It does not appear unreasonable that the traction company, having, in the exercise of the special privilege enjoyed by it of using the street, contributed to the unsanitary condition which injuriously affects the public health and comfort, should be required to aid in removing such conditions. The privilege enjoyed by the defendant in error company to maintain its railway in the street and operate its cars thereon is to be exercised in the interest of the public,—it was to serve the public that the privilege was granted to it. Its business and property are impressed or affected with a public use. It may therefore be subjected to municipal regulations of a greater scope, in the interest of the public at large, than that of a railroad company exercising its franchises on its own road-bed. * * * The ordinance here under consideration is general in its operation, affecting alike all corporations and individuals who are similarly situated and bear the same relation to the streets of the city. The rule of equality and uniformity is not invaded, nor does the ordinance unjustly discriminate against any individual or corporation. * * *

The city, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety or comfort of the people. 'No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an inalienable attribute of sovereignty.' Elliott on Roads and Streets, p. 801.

We are of the opinion the ordinance under consideration is a reasonable and valid exercise of the police power, and that it should be obeyed and enforced accordingly."

(3) The principles governing cases of this kind are set forth in *People v. Chicago City Railway Company*, 324 Ill. 618 (1927). At page 619 the court said:

"This appeal is from the decision of the circuit court of Cook County dismissing the petition of the city of Chicago in which it asked that a writ of *mandamus* issue directing the Chicago City Railway Company to remove its tracks and trolley poles from their existing location in Twenty-second street between Archer avenue and Michigan avenue and re-locate them in the same street to conform to the center line of said street as and when widened."

* * *

(page 620 *et seq.*)

It is also admitted that the public improvement will promote the public welfare, comfort and convenience. * * *

Appellee contended in the circuit court that an order requiring it to re-locate its tracks at its own expense would deprive it of its property without due process of law, would take and damage its property for public use without compensation, and would impair the obligation of its contract ordinances with appellant, contrary to the constitution of this State and the constitution of the United States, and its contentions were sustained. These questions are certified to this court in accordance with section 104 of the Practice act.

A street railway acquires no interest or estate in the soil by laying its rails on the streets under an ordinance permitting it. The grant made by the city is merely a license to the railway company to construct and operate its road upon certain streets. (*City of Sullivan v. Central Illinois Public Service Co.*, 267 Ill. 19; *Chicago City Railway Co. v. People*, 73 id. 541); which becomes a contract when it is accepted and acted upon in a substantial manner * * * In so far as the contract between the city and railway company relates to matters which do not affect the public safety, welfare, comfort or convenience the constitutional prohibition against impairing the obligation of a contract applies, but where, under the police power, the city directs some improvement to be made by the railway company which will promote the public safety, welfare, comfort or convenience no contractual obligation of the city is impaired, because the city has no power to surrender any of the police powers delegated to it by the legislature. (*City of Chicago v. O'Connell*, 278 Ill. 591.) The license under which the railway company constructs, maintains and operates its railroad was granted and accepted subject to a reserved police power on the part of the city to regulate the use and enjoyment by the railway company of the street in such manner as the public convenience or safety at any time might require. * * * The permission given a railway company to use the streets of a city is in subordination to the general power of the municipality over its streets. * * * The power to enact police regulations operates on all alike. This fundamental principle is incident to and part of government itself, and need not be expressly reserved when rights or property is granted to individuals or corporate bodies. They take subservient to this power. (*Ohio and Mississippi Railroad Co. v. McClelland*, 25 Ill. 123.) The police power of a State embraces regulations designed to promote the public convenience as well as regulations designed to promote the public health, morals and safety. *Chicago, Burlington and Quincy Railway Co. v. Illinois*, 200 U.S. 561, 26 Sup. Ct. 341. * * * There is

nothing in the ordinance to indicate that the city has surrendered any of its power and authority to control and improve its streets, and if there were it would be void. The power of the city to protect the public in the use of its streets cannot be abrogated by ordinance or relinquished by contract. * * * The contract under which the company constructed its street railroad was granted and accepted subject to the right of the city to regulate the use of the public streets. * * *

(4) The ordinance to Chicago Transit Authority passed on April 23, 1945 provides in paragraph 5 of Section 13 only for the removal of snow and reads as follows:

"The Grantee, in so far as practicable under weather conditions then existing and to the extent that such snow removal shall not be done by any agencies other than the City, shall keep sufficiently free from snow those portions of the roadway of the streets and public ways within the city occupied by its street car tracks, except parkways, and in so far as practicable shall also push back the snow from the portions of the roadway of the streets and public ways within the city occupied by its street car tracks, except parkways, and in so far as practicable shall also push back the snow from the portions of the roadway which are adjacent to its street car tracks so as to provide a traffic lane on each side of its street car right-of-way and shall also keep those portions of the roadway of such streets and public ways within the city used by its motor vehicles sufficiently free from snow to make the same reasonably passable provided, however, the Grantee shall not be obligated to keep free from snow any portion of any streets or public ways in which the operation of street cars or motor vehicles has been discontinued."

(5) At the hearing before the Committee on Local Transportation on October 22, 1945 Mr. Philip Harrington, Chairman of Chicago Transit Authority, said:

"I think at any time in the future two municipalities can make an agreement with each other, and if some agreement can be worked out, just like this was—it was not part of an ordinance; it was an agreement between the City and the Surface Lines—if it is agreeable, later on, for the City and the Authority to make an agreement, that could be done, whereby the City would undertake to clean the rights-of-way, which is what you do in this case."

We are of the opinion that it is the duty of Chicago Transit Authority under the law at its own expense to keep its street car right-of-way clean. If the City and Transit Authority deem it advisable and advantageous to enter into a contract for the City to perform this service at the expense of the Transit Authority then negotiations could be brought about for the purpose.

REMOVING C. T. A. TRACKS

(No. 11024—Commissioner, Streets and Electricity—B. O'H.—February 2, 1948.)

The Chicago Transit Authority is required by the Ordinance of April 23, 1945 to remove at its own expense all of its track structure

on streets where bus lines are to be substituted. This removal shall include not merely the rails and ties but the base upon which the rails and ties were laid and all that entered into and composed the street car course and way.

Citations:

Ordinance: April 23, 1945, p. 3384 C.J.

Cases: 156 Ill. 285.

48 N.W. 1040 (Mich.).

111 N.W. 860 (Mich.).

Other reference: Vol. 4, Words and Phrases, 112.

OPINION OF FOREGOING SYNOPSIS

In your letter of January 26, 1948 to the corporation counsel you state that it is proposed to build with Motor Fuel Tax Funds new pavement on 71st street between Vincennes avenue and Cottage Grove avenue, that street cars on 71st street in the section mentioned have been replaced with buses but that a question has arisen as to who should pay for the removal of the tracks formerly used by the street cars.

The State Division of Highways, the approval of which is required in the spending of Motor Fuel Tax Funds, you state takes the position that no money from this fund can be used to remove the track structure "as this is the obligation of others."

Chicago Transit Authority you state has informed you informally that it construes "track" to mean rails only, therefore that it will remove the rails only and "leave the balance of the track structure to be removed by the City as a part of the paving work."

Your own position is that the obligation is upon Chicago Transit Authority to remove "rails, ties, ballast or base on which the ties rest, pavement over the ties and between the tracks and all other items of property belonging to the Transit Authority lying within the right-of-way and no longer needed for operations of the Transit facilities."

Referring to the traction ordinance passed by the city council on April 23, 1945 you request our opinion of the meaning of "track" as used in sub-paragraph (1) of section 10, paragraph K (page 3384 C. J.) and of the obligations under the ordinance of Chicago Transit Authority.

"Track" is defined by Webster as "one or more pairs of parallel lines of rails with the fastenings, ties, etc. (sometimes also with the ballast) for a railroad, railway or tramway."

From Words and Phrases we quote:

(v. 4, Second Series, p. 112) "A 'railroad track' is not merely the rails and ties upon which cars are run, but is the road, course, and way, and includes all that enters into and composes such road, course, and way, such as the embankment upon which the rails and ties are laid, etc., *Bird v. Common Council of City of Detroit*, 111 N.W. 860, 878. 148 Mich 71 (quoting and adopting definition in Webst. Dict.; *Gates v. Chicago, St. P. & K. C. Ry. Co.*, 48 N.W. 1040, 82 Iowa, 518)."

The ordinance passed April 23, 1945 and accepted by Chicago Transit Authority constitutes a contract. Effect must be given to each word and term in the contract ordinance and none should be rejected as meaning-

less. (*P. & P. U. Ry. Co. v. Tamplin*, 156 Ill. 285.) Had it been the intention of the city council that the track removal provided for in sub-paragraph (1) under discussion should be confined to the removal of the Authority's rails, and should not include the other component parts of the Authority's tracks, certainly the word "rails" would have been used instead of the word "tracks". This would have been the simple, the natural and the unavoidable thing to have done. The fact that the city council did not use the word "rails" clearly and conclusively answers the contention of Chicago Transit Authority as stated in your letter. The fact that the city council did use the word "tracks" can have but one interpretation. It was the intention of the city council, and the understanding of the Authority when it accepted the ordinance, that on the substitution of motor vehicle operation for street car operation and upon notice by the City that it is ready to repave the right-of-way Chicago Transit Authority at its own expense would remove the *entire track structure* from such portion of the street as would be affected by the change.

It is our opinion, therefore, that Chicago Transit Authority, having substituted bus operation for street car operation on E. and W. 71st street from S. Vincennes avenue to S. Cottage Grove avenue and the City having served notice upon the Authority of the City's intention to repave such portion of E. and W. 71st street, the Authority is required as provided by the ordinance of April 23, 1945 to remove at its own expense all of its track structure on E. and W. 71st street between S. Vincennes avenue and S. Cottage Grove avenue, including not merely the rails and ties but the base upon which the rails and ties were laid and *all* that entered into and composed the street car course and way.

C. T. A. SUBJECT TO WHEEL TAX

(No. 11027—City Collector—J. F. G.—February 7, 1948.)

The Chicago Transit Authority is not exempt from the provisions of the Wheel Tax Ordinance or of the provisions of the Municipal Code regarding the storage of flammable liquids.

The Chicago Transit Authority is exempt from the payment of an annual car license fee for its elevated railway cars.

Citations:

Constitution: Art. 9, Secs. 9, 10, Ill. State Constitution, 1870.

Statutes: IRS '47, Ch. 24, 23-28.1, 23-53, 23-75.

Metropolitan Transit Authority Act, Sec. 31.

Ordinances: Municipal Code, 121.1, 129.1, 129.1-3, 129.1-4, 129.1-5.

Chicago Transit Authority Ordinance, April 12, 1945.

Cases:

297 U.S. 175.

68 Ill. 372.

110 Ill. 186.

235 Ill. 58, 88.

246 Ill. 20.

247 Ill. 276, 287.

300 Ill. 408.

311 Ill. 234.

328 Ill. 377.

343 Ill. 388, 400.

348 Ill. 294, 299-302.

352 Ill. 441, 460.

362 Ill. 24, 41.

363 Ill. 409, 411.

370 Ill. 356, 362.

246 Ill. App. 405.

392 Ill. 77, 90.

OPINION OF FOREGOING SYNOPSIS

On January 19, 1948 you requested information whether Chicago Transit Authority is subject to taxation and regulation by the City of Chicago under the wheel tax ordinance (Code Chapter 29), the license ordinance for storage and handling of flammable liquids (Code Chapter 129.1) and the Fifty dollar (\$50.00) annual license fee provisions for each car of the elevated railways. Our opinion was also requested as to payment of 1948 city vehicle tax (wheel tax) by letter dated January 14, 1948 from the Chicago Transit Authority wherein it is said:

"* * * There is some question as to whether Chicago Transit Authority is required to pay this tax, inasmuch as the right of one municipality to tax another is involved."

The power and right of the city to license, tax and regulate municipal corporations or their property and operations within the territorial jurisdiction of the city is governed by the statutes of the State.

WHEEL TAX

There is no constitutional provision which prohibits a municipal corporation from taxing another such corporation within the territorial jurisdiction of the first for its own corporate purposes (*Krause v. Peoria Housing Authority*, 370 Ill. 356, 362; *The People v. City of Chicago*, 363 Ill. 409, 411). The State constitution permitting tax exemptions is not self-executing. Exemptions exist only by the provisions of the acts of the legislature, and the provisions of the constitution are limitations on legislation upon the subject of tax exemptions (*The People v. University of Illinois*, 328 Ill. 377; *The People v. City of Toulon*, 300 Ill. 408).

The property of Chicago Transit Authority is exempt from taxation by virtue of paragraph (13), section 19, of the Revenue Act of 1939, as amended by an act approved April 12, 1945. The city vehicle tax is not a property tax. It is a license tax upon the privilege of using vehicles on the public streets (*Harder's Storage Co. v. City of Chicago*, 235 Ill. 58, 88).

Article 9 of the State constitution relates to revenue. The first eight sections of this article apply to State and county taxes. Sections 9 and 10 regulate the imposition of taxes by municipalities (*Kocsis v. Chicago Park District*, 362 Ill. 24, 41). However, the power of levying a tax by valuation and to tax occupations, privileges, franchises and other subjects included in sections 1 and 2 of Article 9 may be delegated to municipalities by the General Assembly subject, however, to the rule of uniformity "in respect to persons and property, within the jurisdiction of the body imposing the same," as provided in sections 9 and 10 of this article (*Wiggins v. City of Chicago*, 68 Ill. 372). This rule of uniformity permits a reasonable classification of persons, occupations, privileges, locations and conditions for purposes of taxation by license, but there can be no discrimination by exemption of persons within the class subject to such tax (*Braun v. City of Chicago*, 110 Ill. 186; *Metropolis Theater Co. v. City*, 246 Ill. 20; *Winter v. Barrett*, 352 Ill. 441, 460).

Section 23-53 of the Revised Cities and Villages Act authorizes the corporate authorities of the city "To license, tax, and regulate *all vehicles* conveying loads within the municipality." There may be some doubt if the term "all vehicles" is so comprehensive as to include vehicles owned by non-residents of the city, since sections 26 and 26a of the Motor Vehicle Law provide that no owner of a motor vehicle having a certificate of registration from the Secretary of State shall be required by any municipality to pay any tax or license fee unless he resides in that municipality. Section 29-2 of the Municipal Code of Chicago recognizes

the residence limitation and imposes the wheel tax upon persons residing within the city. However, municipal corporations are "persons" within the meaning of applicable statutes and ordinances and they are not exempt from the payment of a privilege tax even though their property has been exempted from taxation (*City of Chicago v. Ames*, 365 Ill. 529; *People v. Deep Rock Oil Corp.*, 343 Ill. 388, 400).

Chicago Transit Authority was created by the Metropolitan Transit Authority Act approved April 12, 1945. Section 5 of that act provides that its principal office shall be in the city of Chicago, and for all legal purposes, including the wheel tax ordinance, the Authority is a Chicago resident owner of motor vehicles. Section 11 of the act provides:

"The Authority shall not have the right to use any street or other public way in any city, village or incorporated town for local transportation of passengers within any such municipality, unless and until authorized so to do by an ordinance passed by the corporate authorities of such municipality and said ordinance shall have been approved by popular vote as provided by law governing such municipalities."

Section 23-28.1 of the Revised Cities and Villages Act, as amended by an act approved April 12, 1945, relating to a grant to a public authority for local transportation provides:

"* * * if such grant is by ordinance prescribing terms, conditions and limitations, it shall not be effective unless and until such ordinance shall have been accepted in writing by the grantee and such acceptance shall have been filed with the municipal clerk."

Chicago Transit Authority operates its local transportation system within the city of Chicago by virtue of an ordinance passed by the city council April 23, 1945 and approved by popular vote on June 4, 1945. The ordinance was accepted by the Authority on July 10, 1945. Section 18 of that ordinance provides for the payment of compensation to the city "* * * after payment or provision has been made for: all operating expenses, taxes if any, interest * * *" and further, "*There shall be credited to the Grantee against the compensation to be paid by the Grantee for any fiscal year under the provisions of this section 18 a sum equal to all amounts paid in such fiscal year by the Grantee to the City for wheel tax license fees.*"

It seems clear that the Chicago Transit Authority was not exempted from the vehicle license tax and that it was not intended by the corporate authorities of the city nor by the Chicago Transit Authority parties to the contract ordinance of April 23, 1945 that the Authority should be exempt from payment of the wheel tax. On the contrary, it is evident that one of the conditions of the grant accepted by the Authority is that the wheel tax shall be paid as one of its operating expenses, subject only to a credit for such tax paid against compensation required to be paid to the city on the gross receipts of the Authority.

STORAGE AND HANDLING OF FLAMMABLE LIQUIDS

Chapter 129.1 of the Municipal Code of Chicago deals with this subject. Section 129.1-1 permits storage of flammable liquids for use in any business having a flash point below 187° Fahrenheit or 86° Centigrade only by license from the city for each location. Section 129.1-3 establishes a schedule of fees for such licenses. Section 129.1-4 provides that all storage facilities shall comply with the provisions of the fire prevention chapter and the hazardous use units chapter of the code. It also requires inspection of certain containers for flammable liquids by the division marshal in charge of fire prevention and prescribes safety regulations to prevent fires. Section 129.1-5 fixes penalties for violation of the chapter.

The Chicago Transit Authority is a municipal corporation, but its sole purpose is to operate a public transportation system. Under the law, such operations are affected with the public interest, both under private ownership and public ownership. Public ownership and operation does not change the character of a public carrier for hire as a "business" within the meaning of Chapter 129.1 of the code (*United States v. California*, 297 U. S. 175). The Authority has only such governmental powers as are necessary to the purpose for which it was created. These relate to the internal management of its operations (*The People v. Chi. Transit Authority*, 392 Ill. 77, 90).

When the legislature amended the Public Utilities Act by removing from control of the Illinois Commerce Commission public utilities operated by a political subdivision or municipal corporation, it did not transfer to the Authority all of the powers of the commission affecting the transportation system. Section 31 of the Metropolitan Transit Authority Act provides:

"The Board shall have power to pass all ordinances and make all rules and regulations proper or necessary to regulate the use, operation and maintenance of its property and facilities, and to carry into effect the powers granted to the Authority, with such fines or penalties as may be deemed proper."

This is by no means a delegation of all of the police power of the State which may affect the property and facilities of the Authority.

The Board is not vested with uncontrolled power to maintain and operate its property and facilities. It is subject to the police powers of the municipalities to provide for the safety, health, morals and welfare of all the people within whose territorial jurisdiction the public transportation is operated. It cannot be contended seriously that the Authority may ignore the building and zoning laws of the city in the location, construction and maintenance of its garages and car barns. It may not violate the traffic ordinances of the city, nor ignore the necessary orders of the city council affecting the location or relocation of street car tracks to conform with public improvements in city streets.

The true concept of the relations between the city and Chicago Transit Authority in the exercise of their respective governmental powers is illustrated by the case of *County of Cook v. City of Chicago*, 311 Ill. 234. The county sought an injunction against the city from enforcing its fire and building ordinances upon the construction of a county jail located within the territorial limits of the city. It was contended that the city did not have the right to enforce its ordinances against the county. At page 246 the court said:

"It is urged that the county is an arm of the State to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the State it is likewise a creature of the State vested with only the powers conferred upon it by the State. It is not correct, therefore, to say that the county is a part of the State in the exercise of police power. * * *

"We are of the opinion that the police power delegated to the city must be construed, as between the county and the city, as a delegation of a power to the latter which the former is expected to observe. What was said in the cases of *People v. Board of Supervisors of LaSalle County*, *supra*, and *County of Mercer v. Wolff*, *supra*, had to do with the general power of a county to determine the character, size and location of a county court house and a jail. The matter of the police power or the obligation of the county to observe the reasonable exercise of that power delegated to cities in which

county buildings are located was not there discussed. We are of the opinion that in enacting paragraph 63 of article 5 of the Cities and Villages act, and in using the language, 'and to cause all such buildings and inclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipalities located therein."

In *City of Chicago v. Board of Education*, 246 Ill. App. 405, the court had for consideration a suit to recover fees for inspection of weights and scales under the control and management and in the possession of the Board of Education and located on school property in the city. On the authority of *County of Cook v. City of Chicago* and other cases cited, the court held that the property of the Board of Education was subject to the city's police regulations governing the inspection of weights and scales and that the Board of Education was liable for the inspection fees.

The power of the city to pass Chapter 121.1 of the code rests principally on section 23-75 of the Revised Cities and Villages Act: "To regulate and prevent the storage of turpentine, * * * petroleum, or any of their products, and other similar combustible or explosive material." It is one of the most essential of all the police powers enumerated for the government of cities, villages and towns. The protection of life and property from fire in urban communities is primarily a community obligation and all governmental functions necessary for such protection has always been lodged in the corporate authorities of boroughs, towns, villages and cities. Such powers are universally implemented by the establishment of a fire department and the maintenance of a water supply system.

It is a fundamental principle of the law of municipal corporations that two distinct municipal corporations cannot exercise the same powers, jurisdiction and privileges in the same territory at the same time. Conflict between such corporations must be avoided by construing their respective powers and functions so that they will be consistent with the purposes for which each was created. (*The People v. Bowman*, 247 Ill. 276, 287.)

In our opinion, the regulation of the storage and handling of flammable liquids, which involves control of the location and the structure of containers, tanks and other equipment used for the storage of such liquids is in the same category as the regulation of the location and construction of buildings under the building and zoning ordinances of the city.

The power to regulate anything which may be injurious to the public carries with it the power to license and to impose license fees reasonably commensurate with the cost of the service involved in the licensing and regulation (*Fligelman v. City of Chicago*, 348 Ill. 294, 299-302).

Chicago Transit Authority is subject to all the license provisions under Chapter 129.1 of the Municipal Code of Chicago.

ELEVATED RAILROAD CAR LICENSE FEES

Between the years 1888 and 1896 the city council of Chicago passed a number of ordinances authorizing private corporations to construct, maintain and operate elevated railroads along certain routes in the city. Each of these ordinances had a provision for compensation to be paid to the city on the first day of May in each year in advance, called an annual license fee, of fifty dollars (\$50.00) for each and every car used in transporting passengers for hire. Upon such payment the city clerk was required to issue a license for each car in the same way as other licenses are issued by the city clerk. Each of the ordinances was accepted

by the grantee named, and became a contract between the city and said grantee. All of these contract ordinances have expired or have been terminated by final orders of the United States District Court for the Northern District of Illinois in reorganization proceedings whereby Chicago Transit Authority acquired the elevated railroads.

Chicago Transit Authority operates a unified local transportation system in the city of Chicago including surface lines, motor bus lines and elevated railroads by virtue of an ordinance granting rights to the Authority passed by the city council on April 23, 1945 and accepted July 10, 1945. This contract ordinance provides for the payment of compensation to the city on an entirely different basis than that provided in the elevated railroad companies' franchise ordinances. Section 18 of the Chicago Transit Authority ordinance covers the subject of compensation and there is no provision for an annual car license fee.

The elevated railway licenses were never issued by virtue of any police power of the city and the city cannot exact a license fee or tax from Chicago Transit Authority under the present law.

REMOVING ABANDONED TRACKS

(No. 11069—Commissioner, Streets and Electricity—B. O'H.—July 30, 1948.)

The Chicago Transit Authority is not obliged to pay the County for the cost of removing its abandoned street car tracks from a street the County is paving.

Citation: Ordinance (passed) April 23, 1945—(C.T.A.).

OPINION OF FOREGOING SYNOPSIS

In your letter of July 20, 1948 you inform us that the Cook County Highway Department has awarded a contract to pave 119th Street from S. Ashland Avenue to S. Longwood Drive; that there are car tracks in the street between Ashland Avenue and Vincennes Avenue and that these tracks are partly within and partly outside the city limits.

You request our advice (1) whether under Chicago Transit Authority Ordinance passed April 23, 1945 the City is required to notify the Chicago Transit Authority to remove its abandoned tracks from a street about to be paved by the County, and (2) whether under the ordinance passed April 23, 1945 Chicago Transit Authority is required to make a contribution toward the cost of the new pavement of \$5,000 per mile of single track and \$10,000 per mile of double track when the paving is being done by the County.

Paragraph K (1) of the ordinance passed April 23, 1945 provides for notice by the City to Chicago Transit Authority.

" * * * that the City or any other governmental authority or public agency is ready to repave such right-of-way * * *."

Said paragraph K (1) also provides that Chicago Transit Authority:

"* * * shall pay to the City, at such time as the City is ready to repave any such paved right-of-way and shall have notified the Grantee to that effect, at the rate of five thousand dollars (\$5,000) per mile of single track and ten thousand dollars (\$10,000) per mile of double track, so removed from any such street, alley, public way or public ground within the city in payment to the City of a portion of the City's cost of repaving such paved right-of-way."

It will be seen that whereas notice to Chicago Transit Authority by the City is required when the City "*or any other governmental authority or public agency*" is ready to repave such right-of-way the provision requiring payment by Chicago Transit Authority to the City of \$5,000 per mile of single track and \$10,000 per mile of double track is limited to repavement done by the City. The ordinance specifically states that such payment to the City by the Authority is "in payment to the City of a portion of the City's cost of repaving such paved right-of-way."

It follows, therefore, that when the repaving is done not by the City and is as in this case done by the County and no part of the cost of the repaving is assumed by the City no contribution is required of Chicago Transit Authority. Notice, however, should be given Chicago Transit Authority by the City when the City or some other governmental authority or public agency is ready to repave such right-of-way.

SAFETY ISLAND LIGHTS

(No. 11078—Purchasing Agent—F. T. M.—September 30, 1948.)

The Purchasing Agent has the sole authority to enter into an agreement with the Chicago Transit Authority wherein the Chicago Transit Authority agrees to furnish electric energy for lighting safety islands at a prescribed annual charge.

Citations:

Ordinance: Municipal Purchasing Act, Sec. 22A-4.

Other reference: 18 Op. Corp. Coun. 624.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your letter of September 16, 1948, pertaining to a proposed written agreement between the City of Chicago and the Chicago Transit Authority, wherein the Transit Authority agrees to furnish electric energy for lighting, approximately 1420 safety islands at an annual charge of Forty-Two Dollars (\$42.00) per safety zone. The questions presented in your letter are as follows:

1. Has the Commissioner of Streets and Electricity authority to execute this agreement for and on behalf of the City of Chicago.
2. Whether the Chicago Transit Authority may be required to light the safety islands and loading platforms which have been installed on sundry city streets upon which are located street car lines.

As to the first question, it is our opinion that the Commissioner of Streets and Electricity has no authority to execute this proposed agreement on behalf of the City. The Purchasing Act specifically provides that the award of any contract involving amounts in excess of One Thousand Dollars (\$1,000.00) shall be made by the purchasing agent after approval by the corporate authority. The proposed agreement being for utility services is not subject to the competitive bidding requirement of the Purchasing Act, as provided for in Section 22A-4.

The second question was previously considered in an opinion of this department, No. 5439, dated January 2, 1935, addressed to the chairman of the subcommittee on finance, (C.C. Opinions Vol. XVIII, page 624) and stated in part as follows:

"Thus it will be seen that the installation of safety islands and zones is of benefit to not merely the users of street cars but pedestrians in general as well as motorists. Under this state of facts we doubt that the courts would hold that the Chicago Surface Lines are obligated to pay for the lighting of the islands. Whether it would be possible by negotiations with the officials of the lines to get them to recognize a pecuniary benefit flowing to their companies through the use of the islands and thereby obtain an agreement whereby the lines would contribute to the expense of lighting is a matter for your committee."

The acquisition of the transportation properties by the Chicago Transit Authority would not be to lessen the responsibility of the City of Chicago.

Section 22A-10 of the Purchasing Act provides as follows:

"§ 22A-10. The award of any contract involving amounts in excess of one thousand dollars (\$1,000) shall be made by the purchasing agent after approval by the corporate authority by the affirmative action of a majority of all members elected thereto to the lowest or highest responsible bidder as provided in Section 22A-3 of this Article and shall be signed by the mayor or his duly designated agent, by the comptroller and by the purchasing agent, respectively, of such municipality: Provided, that all such contracts shall be awarded in accordance with the recommendations of said purchasing agent unless the recommendations and the reasons for their rejection are spread at large upon the official public records of such corporate authority. * * *

It is clear that action taken under this section is predicated upon the recommendation of the purchasing agent, who it must be presumed had considered every aspect of the proposed contract prior to submittal. In case of a contract not subject to competitive bidding, the duty of negotiating the contracts and details thereof rests upon the purchasing agent.

It is our opinion that the proposed agreement would be proper as to form and legality upon substitution of the words "Purchasing Agent" wherever there appears the words "Commissioner of Public Works," subject however to your discretion in the matter of recommending same to the City Council. It is suggested that a provision be incorporated in this proposed agreement setting forth that since January 1, 1948, the service as described has been furnished by the Chicago Transit Authority and that the proposed agreement provide for renewal from year to year subject to approval of the Chicago Transit Board and the City Council of the City of Chicago. The documents attached to your letter are returned herewith.

SECTION III

MANAGEMENT OF THE MUNICIPAL CORPORATION

CHAPTER XI—FINANCE

A. APPROPRIATIONS AND TAXES

DELINQUENT TAX PROPERTY

(No. 10750—City Comptroller—M. J. N.—July 20, 1943.)

Under the Revenue Act the City must take possession of delinquent tax property conveyed in a tax deed or institute proceedings in good faith to take possession within one year after the date of the first tax deed.

Citations:

Statutes:	IRS '41, ch. 120, secs. 688 to 756 (Revenue Act).	
Cases:	36 Ill. 265, 287.	316 Ill. 104, 112, 113.
	135 Ill. 190, 207.	346 Ill. 157, 161.
	152 Ill. 207, 212, 213.	346 Ill. 623, 629.
	232 Ill. 210, 213.	354 Ill. 620, 627-630.
	302 Ill. 455, 457.	371 Ill. 280, 282.

OPINION OF FOREGOING SYNOPSIS

We have your letter of March 1, 1943, inquiring into the rights of the city to take possession of property on which it has tax claims based on tax deeds, tax sales, forfeitures or withdrawals, on account of delinquent special assessments.

This general subject of tax collections (including tax claims based on special assessments levied under our Local Improvement Act, *City of Chicago v. University of Chicago*, 302 Ill. 455 (1922), at p. 457; *People v. Taylorville*, 371 Ill. 280 (1934), at p. 282), is covered in the Revenue Act (Chap. 120, Ill. Rev. Stat. 1941, Section 688 to 756, inclusive).

A study of the many cases involving claimed rights growing out of delinquency in payment of taxes brings us to the conclusion that the courts will construe every question involved strictly to the letter of the statute, and wherever possible against the claimant. (*Lawton v. Sweitzer*, 354 Ill. 620, (1934), at pps. 627-630.)

The courts have held generally as to tax titles as follows:

"A tax title is *stricti juris*. It is purely technical, as contradistinguished from a meritorious title, and depends for its validity upon strict compliance with the statute."

(*Atles v. Hinckler, et al.*, 36 Ill. 265 (1864) at p. 287; *Miller v. Cook, et al.*, 135 Ill. 190 (1890) at p. 207.)

The sixty-eight sections of the Revenue Act hereinbefore cited are replete with prerequisite duties imposed upon a tax title before it gives the holder even color of good ownership, and the failure of any one of them can void the title. The following language of the court is typical:

"Parties claiming title to land under a tax deed must prove that they complied with every requirement of the law to entitle them to tax deeds." (*City of Chicago v. Collin*, 316 Ill. 104, (1925), at pages 112 to 113.) Note the burden is on the party claiming to prove that he complied with every requirement of the law.

Under Chapter 120 (Revenue Act), Section 751, Illinois Revised Statutes (1941), a tax deed is not *prima facie* evidence of the sufficiency of of the many prerequisites necessary to the making of a good title under a tax deed. In the absence of evidence brought by claimant to satisfy the burden of proof carried by him, and in the absence of a prior precept and judgment, the title is not valid. (*Gilbreath v. Dilday*, 152 Ill. 207 (1894) at p. 212.)

The tax title in the process of becoming good must not only have a history of conditions precedent performed in strict compliance with the statute, but also must be supported by a number of requisites after the delivery of a deed. It is in this connection that we can answer a number of your specific inquiries.

If the city intends to establish good ownership under a tax deed the city not only has the right, but under Section 736 of the Revenue Act must take possession or occupancy of the premises conveyed in the deed or it must institute proceedings in good faith to take possession within one year after the date of the first tax deed. (*Bowers v. Glos*, 346 Ill. 623 (1932) at page 629; *Elmhurst State Bank v. Stone*, 346 Ill. 157 (1932) at page 161; *Lawton v. Sweitzer*, 354 Ill. 620 (1934) at page 625.)

There are other conditions and we quote the statute (Chapter 120, Section 736, Illinois Revised Statutes (1941), page 2719):

"Whenever the grantee of a tax deed to real estate or any one claiming thereunder, shall not be in possession or occupation of said premises so claimed and shall not take or institute proceedings in good faith to take possession within one year after the date of the first tax deed under his alleged tax title, or whenever the grantee of a tax deed to real estate or any one claiming thereunder shall suffer the same to be forfeited to the State or again sold for taxes or special assessments before he has completed the payment of all taxes and special assessments legally assessed thereon for seven consecutive years, then it shall be lawful for the owner of said real estate or his agent or attorney to pay or tender said tax title holder * * * upon said sale with seven per cent (7%) interest per annum thereon, together with subsequent taxes and special assessments paid and the statutory fees and costs incurred, and that upon such payment or tender the said tax title holder shall reconvey the premises aforesaid to the owner thereof."

Note that this section applies only in cases where the city has acquired title by tax deeds. Tax forfeitures, judgments and sales are merely liens against the property, and the right to possession of the property does not follow with them. Withdrawals under Section 279A of the Revenue Act merely transfers the right to collect delinquent special assessments from the County Clerk to the City Collector and we do not believe that withdrawal carries with it the right by the city to possession of the property withdrawn.

Answering Paragraph 2 of your letter, we advise that ouster proceedings can be resisted only when the individual case can stand up on its own merits under the law as above cited. A request for payment of the city's claims might be pleaded in ouster proceedings and the courts have repeatedly held that: "one taking possession of land under a tax deed is

not a mere trespasser and if required to account for rents and profits should be allowed for permanent improvements if reasonable and beneficial, as well as for taxes and assessments paid, with interest thereon." (*Gilbreath v. Dilday*, 152 Ill. 207 (1894) at page 213; *Metropolitan v. Eschner*, 232 Ill. 210 (1908) at page 213.)

The many pitfalls in the way of good ownership under a tax title would impel us to advise that, unless the city's right to possession under a tax title has been adjudged good by a decree of court, the city should be cautious in granting assignments, leases or other privileges in connection with the properties involved.

We have examined the consent form enclosed with your letter and consider it to be in good form and advise your continued use of same.

The city's rights in specific cases should be examined carefully in the light of their own tax records and we, therefore, cannot advise on the matters referred to in the last two paragraphs of your letter without an examination of the facts in each case.

MOTOR FUEL TAX FUNDS—TRAFFIC SIGNALS

(No. 10778—Commissioner, Streets and Electricity—A. F. G.—April 19, 1944.)

Motor Fuel Tax funds may only be used for the maintenance of traffic signals built with such funds. Motor Fuel Funds may be used for the construction of traffic signals on highways or arterial streets which have been improved by authority of the Highway Department.

Citations: Motor Fuel Tax Law as amended by Senate Bill 437, July 1, 1943. Sec. 10½, pars. 4, 5.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of January 4, 1944 regarding the construction of section 10½ of the Motor Fuel Tax Law as amended by senate bill 437 approved July 1, 1943. You attached thereto a copy of a letter from the Department of Public Works and Buildings Division of Highways which states the interpretation that department places on the recent amendments to the law.

The two paragraphs of section 10½ which require construction are paragraphs 4 and 5 which read as follows:

"4. The construction or maintenance, or both, on arterial streets or thoroughfares on which such construction is authorized by law, of automatic traffic control signals exhibiting the words 'stop,' and 'go,' or lights indicating such traffic signals.

5. The construction or maintenance of but not the operation of highway lighting systems, or both, on improved arterial streets or

thoroughfares (including State highways) within the municipality, where such improvement has been authorized by the Department."

The interpretation placed on these provisions by the department in their letter of December 2, 1943 is as follows:

"In connection with the maintenance and operation of traffic control signals, I wish to advise that our interpretation of Paragraph 4, Section 10½ of the Motor Fuel Tax Law, is that Motor Fuel Tax funds may only be used for the maintenance and operation of signals which were built by the City with Motor Fuel Tax Funds, or by the County under State supervision, or by the State. Our interpretation of Paragraph 5, Section 10½ of the Motor Fuel Tax Law, is that Motor Fuel Tax funds may only be used for the maintenance of street lights which were constructed with Motor Fuel Tax Funds. This does not include energy costs.

"In view of these interpretations, I do not believe that we could approve the use of Motor Fuel Tax Funds to defray the cost of maintaining the traffic signals and street lights on all arterial streets and State highways in the City of Chicago, nor do I believe that Motor Fuel Tax funds could be used for the maintenance and operation of illuminated loading platforms."

We have been unable to find any case in which these paragraphs have been construed by a court. Nor do we find in the printed volumes of "Opinions of the Attorney General" any opinion by that official construing these provisions. The District Engineer of the Chicago office advises us that as far as he knows the interpretation of the department of these provisions was not predicated on any legal opinion by the attorney general but is the construction placed on the act by the department itself.

We think the construction of this act by the department is too narrow. Nothing in the language of either paragraph, warrants the conclusion that motor fuel tax funds can be used for the maintenance of signals and lights only where such signals or street lights are constructed with motor fuel tax funds.

We believe that paragraph 4 should be construed as if it read:

"The construction or maintenance or both, of automatic traffic control signals exhibiting the words 'stop' and 'go' or lights indicating such traffic signals, on arterial streets or thoroughfares on which the construction of such signals is authorized by law."

And so, if signal lights are installed by ordinance of the city council on arterial streets and thoroughfares out of corporate funds, their construction "is authorized by law" and motor fuel tax funds may be used for their maintenance by the provisions of this paragraph.

In our opinion paragraph 5 should be construed as if it read:

"The construction or maintenance of but not the operation of highway lighting systems or both, on improved arterial streets or thoroughfares (including State highway) within the municipality, where the improvement of such streets has been authorized by the department."

And so, if an arterial street or State highway has been improved by authority of the department, motor fuel tax funds may be used for the construction or maintenance of highway lighting systems or both, on such streets and highways.

If the legislature had intended as is contended by the department, that motor fuel tax funds could only be used for the maintenance of signals or lighting systems the original cost of which was paid out of these funds it would have been a simple matter to have expressed that intention. Not having done so it is reasonable to assume it did not intend to do so.

HOUSE OF CORRECTION

(No. 10798—*Superintendent, House of Correction—M. H. F.—July 5, 1944.*)

Under the provisions of the Illinois Retailers' Occupation Tax

- (1) The House of Correction is not a person selling tangible property at retail as specified in the Act.
- (2) Persons supplying food, articles of clothing or dispensary items, which personal property is used as a necessary incident in rendering service to the inmates of the House of Correction are not subject to the tax.
- (3) Persons selling to the House of Correction property which is retained and used or consumed in the maintenance of the institution or the personnel employed by it, would be subject to the tax.

Citations: 367 Ill. 626.
370 Ill. 180.
370 Ill. 627.
372 Ill. 598.

381 Ill. 187.
381 Ill. 194.
386 Ill. 334.
386 Ill. 479.

OPINION OF FOREGOING SYNOPSIS

Your letter of June 24, 1944, states that your attention has been called to a decision by the Supreme Court of Illinois said to have been rendered May 1, 1944, holding that institutions are exempt from the payment of the State Retailers Occupation tax. You request our opinion concerning the matter.

We know of no such decision rendered on that date. Under date of March 21, 1944, rehearings denied May 11, 1944, the court released opinions relative to the Retailers Occupation Tax Act. In the case of *Huston Brothers Co. v. McKibbin*, 386 Ill. 479, the court held that the amendment of 1941 to section 1 of the Act defining "use or consumption" was invalid as transcending the Illinois Constitution. By the amendment the usual and popular meaning of use or consumption had been enlarged to include the employment of tangible personal property by persons engaged in service occupations. Specifically the court held that the occupation of selling medical and pharmaceutical preparations to physicians, hospitals and sanitariums is not subject to taxation under the Act, as the sales are not to the ultimate user or consumer. Beginning on page 482 of its opinion the court said:

"Prior to the amendment of 1941, plaintiff was not subject to a tax on the sales of its products to doctors and hospitals under the Retailers' Occupation Tax Act, as it then obtained. (*Mallen Co. v. Department of Finance*, 372 Ill. 598.) We there held that the occupation of selling medical and pharmaceutical preparations to physicians, hospitals and sanitarium, is not subject to taxation, as a doctor or hospital employs such supplies in the same manner as an optometrist employs lenses and frames, choosing the type or nature of application best adapted to the individual patient. Our conclusion rested on the theory that a seller's occupation is not taxable, under the Retailers' Occupation Tax Act, unless the purchaser is to be the ultimate user or consumer or there is to be no further transfer of the property. (*American Optical Co. v. Nudelman*, 370 Ill. 627; *Revzan v. Nudelman*, 370 Ill. 180.) Fortifying *Mallen Co. v. Department of Finance*, 372 Ill. 598, is the established rule that a tax is not due where sales, though at retail and for use and consumption and for resale, are merely incidental to a business which the vendor is licensed or authorized to transact. *Swithiod Singing Club v. McKibbin*, 381 Ill. 194; *Babcock v. Nudelman*, 367 Ill. 626."

In another case, that of *Stolze Lumber Co. v. Stratton*, 386 Ill. 334, the amendment of 1941 was considered in connection with the question whether persons engaged in the business of selling building materials and fixtures to construction contractors were subject to the payment of the tax. The court held that the amendment did not substitute a new definition for "sale at retail" or "for use or consumption," but added to the commonly known definition of "use or consumption" an additional definition to include sales for resale by persons named therein, and as the Act, both by its title and its language, is limited to the subject of sales not for resale in any form, the amendment was invalid.

Your request for an opinion is not entirely clear. We assume, however, that your inquiry is intended to include (1) whether the House of Correction, or the City of Chicago, is supplying food and articles of personal property to prisoners is required to pay the tax, and (2) whether sellers of tangible personal property at retail to the House of Correction are subject to the tax.

In our opinion the House of Correction is not a person selling personal tangible property at retail within the meaning of those words as used in the Act. It does not hold itself out as engaged in the business of selling such tangible personal property at retail. On the contrary it is a non-profit governmental unit engaged in a service occupation. The occupation tax is a tax upon a class of vendors engaged in the business of selling tangible personal property at retail.

In *Swithiod Singing Club v. McKibbin*, (1942) 381 Ill. 187, the court held that a social club which sells food and drinks to its members was not subject to the tax where it was organized and chartered not for profit but for the primary purpose of promoting social intercourse among its members. It was said that the organization could not be regarded as being engaged in any commercial enterprise. By analogy the House of Correction, not being engaged in a commercial enterprise or engaged in business as the word business is used in the Act our opinion is that it is not required to pay the occupation tax when it supplies the inmates of its institution with personal property. In fact Rule No. 40 of the Department of Revenue of the State of Illinois specifically states that governmental units, including municipalities and other political subdivisions of the State are non-commercial enterprises which are not engaged in business within the meaning of the Retailers' Occupation Tax Act, but are engaged in service occupations, and consequently such governmental units are not required to remit the tax even though they sometimes realize gross re-

ceipts from the sale of tangible personal property at retail. Such retail sales are regarded as a necessary incident to their primary function of rendering service.

The second question, whether persons engaged in the selling of tangible personal property at retail to the House of Correction are subject to the tax, is more difficult of solution. So far as we know the Supreme Court has not yet spoken on this particular question. If it follows its decision in the *Huston Brothers* case, which holds that the occupation of selling supplies to hospitals and sanitariums to be used for the treatment of patients is not subject to taxation, then it would seem to us that the court would decide that the business of selling supplies to the House of Correction for the maintenance of its inmates, would not be subject to tax. However, there are a number of rulings made by the State Department of Revenue to the effect that certain sales to governmental institutions are not exempt. The State Department of Revenue evidently takes the position that suppliers of local governmental units are liable for the tax because Rule No. 40 above referred to states that persons engaged in the business of selling tangible personal property are required to remit the tax where (a) such governmental units retain and use or consume such property, as the words "use" or "consume" are popularly understood; (b) such governmental units transfer such property to others without a valuable consideration; or (c) such governmental units transfer such property to others as a necessary incident to their rendering of service.

In view of the *Huston Brothers* decision it seems to us that clauses (b) and (c) of the above mentioned rule will require modification. Our opinion is that those persons supplying food, articles of clothing or dispensary items, which personal property is used as a necessary incident in rendering service to the inmates of the House of Correction, are not subject to the tax. Those persons selling tangible personal property at retail to the House of Correction, which personal property is retained and used or consumed in the maintenance of the institution or the personnel employed by it would, in our opinion, be subject to the tax.

APPLICATION OF SALES TAX TO PURCHASES BY THE MUNICIPAL TUBERCULOSIS SANITARIUM

(No. 10807—*Superintendent, Municipal Tuberculosis Sanitarium—E. R. H.—August 2, 1944.*)

Same as Opinion No. 10798—M. H. F.—July 5, 1944, page 507.

MOTOR FUEL TAX FUND

(No. 10852—*Commissioner, Public Works—J. J. M.—August 2, 1945.*)

The Department of Public Works and Buildings is authorized to expend the amounts of the Motor Fuel Tax Funds apportioned to the state for any of the purposes designated in the Statute. They include

the construction or reconstruction of arterial streets and the separation of grades of said streets with railroads in every instance where said streets and grade crossings provide access to military and naval reservations, to defense industries and defense industry sites.

Citations: IRS '43, ch. 120, pars. 417-434 incl.
Motor Fuel Tax Law, sec. 10½, 11.

OPINION OF FOREGOING SYNOPSIS

In your letter of recent date concerning the above subject matter, you request an opinion as to whether or not the state, if it so desires, can use its share of Motor Fuel Tax Funds for the construction or reconstruction of arterial streets or for the purpose of separating the grades of arterial streets with railroads.

Authority for the use of Motor Fuel Tax Funds is derived from the Motor Fuel Tax Law of Illinois (Ill. Rev. Stat. 1943, Chap. 120, Par. 417-434 incl.)

This law designates how and to whom said funds shall be apportioned and after their apportionment how and in what manner the respective shares of the funds so apportioned shall be expended.

The only reference in the Motor Fuel Tax Law to the expenditure of any portion of Motor Fuel Tax Funds in the construction or reconstruction of arterial streets is found in Section 10½ of the law. This section designates how the share of Motor Fuel Tax Funds apportioned to municipalities shall be expended, a question you at present are not concerned with.

Section 11 of said law which designates how the share of such funds apportioned to the State of Illinois, to be administered by the Department of Public Works and Buildings shall be expended as amended and in force and effect prior to July 23, 1943 provided that the amounts so apportioned be used for:

"The construction, reconstruction and maintenance of State bond issue roads, Federal aid roads, including such work within municipalities authorized by Acts of Congress and of this State relating to such roads, Federal Secondary roads, or State highway-belt-line roads or the maintenance of said highways in municipalities or for the purchase of land and erection of buildings for highway purposes or the purchase of right of way, or the separation of the grades of said State highways with railroads and with highways or where necessary in the judgment of the Department of Public Works and Buildings to provide adequately for traffic needs, the widening and improving of said State highways, or for any purpose relating or incident to and connected with the construction, reconstruction or maintenance of said roads
* * *"

By virtue of this section as then in effect the expenditure of the share of Motor Fuel Tax Funds apportioned to the state was limited to the specific expressed purposes enumerated in said section. However, said section was amended by act of the legislature in 1943 by adding to and incorporating in said section the following:

" * * * or for making of surveys, plans, specifications and estimates for and in the construction and maintenance of flight strips and of roads and bridges necessary to provide access to military and

naval reservations, to defense industries and defense-industry sites, and to the sources of raw materials and for replacing existing highways and highway connections shut off from general public use at military and naval reservations and defense-industry sites, or for the purchase of right of way, except that the State shall be reimbursed in full for any expense incurred in building the flight strips. As amended by act approved July 23, 1943."

We are of the opinion that by virtue of this amendment the Department of Public Works and Buildings is authorized, if it desires to do so, to expend the amounts of Motor Fuel Tax Funds apportioned to the state for any or all of the additional purposes enumerated in the amendment.

We are further of the opinion that the purposes enumerated in said amendment include the construction or reconstruction of arterial streets and the separation of the grades of said streets with railroads, in every instance where said streets and grade separations provide access to military and naval reservations, to defense industries and defense industry sites, and to sources of raw materials.

TAXING SCHOOL ATHLETIC PROGRAMS

(No. 11017—Attorney, Board of Education—M. H. F.—January 6, 1948.)

The City's Amusement Tax Ordinance does not apply to athletic programs carried on by the public schools.

OPINION OF FOREGOING SYNOPSIS

The department is in receipt of your letter of December 18, 1947, requesting our opinion as to the applicability of the city's Amusement Tax ordinance to athletic programs carried on by the public schools.

You state that the Board of Education as a part of its statutory responsibility in fully operating the school system, must carry on an extensive athletic program in the schools; that in order to defray the expense of such athletic program, a charge is collected for admission to certain athletic contests engaged in by the students of the various schools; and that the Board of Education does not present or conduct these contests for gain or profit but in furtherance of the physical educational betterment of the student body.

Under date of December 12, 1947 an opinion was written to the Chairman of the City Council Committee on Finance, relative to the three per cent tax, which opinion has a bearing upon your inquiry. A copy of the opinion is enclosed herewith.

As we view the matter the Board of Education is not engaged in conducting athletic contests or amusements in regular course as a profession or in the operation of an amusement business, and the occasional holding of athletic contests engaged in by students of the various Chicago Public Schools, to which contests admission fees are charged, would not in our opinion subject the Board of Education to the payment of the tax imposed by the ordinance.

If, however, the Board of Education were to rent an athletic field or stadium for professional athletic contests or to professional promoters of athletic contests then our opinion would be that such contests are subject to the tax and the Board of Education would be required to procure a public place of amusement license pursuant to chapter 104.1 of the Municipal Code and guarantee the payment of the tax to the city.

SALES TAX

(No. 11079—*Purchasing Agent*—A. F. G.—October 6, 1948.)

If the City buys material for use and consumption, the dealer selling the material is primarily responsible for the tax.

Citations:

Cases: 352 Ill. 441.
 359 Ill. 152.
 384 Ill. 293.

Other references: 19 Op. Corp. Coun. 387.

OPINION OF FOREGOING SYNOPSIS

In your memorandum of September 21, 1948 re sales tax, you say: "A point that keeps constantly recurring is whether or not the City is liable for the payment of Illinois Occupational Retailers' Tax on purchase of material for use. * * * As this question constantly comes up I would like to get a final and definite ruling as to where we are obliged to pay the tax and where we are exempt."

The tax imposed by the Retailers' Occupation Tax Act, is not a tax on the purchaser, but the purpose of the act is to impose a tax upon persons engaged in the business of selling tangible goods at retail. The tax is not a sales tax on the consumer and so far as the statute is concerned no duty rests on him to pay the tax imposed upon the retailer. By the provisions of the Act the dealers are neither required to take nor prohibited from taking into consideration the amount of the tax to be paid by them in fixing the selling price of articles sold; *Winter v. Barrett*, 352 Ill. 441 (1933).

On November 2, 1933 the Department of Finance of the State of Illinois issued a bulletin containing the following rule:

"A retailer may advertise to his clientele that his base prices are subject to a two per cent increase on account of the increased cost of doing business under the Retailers Occupation Tax Act and may add this amount by way of a separate item."

When the City operates its water works and furnishes water to its citizens it is not engaged in the business of selling tangible personal property, but rather is engaged as a public utility in furnishing "service" and for that reason is excluded from the Retailers Occupation Tax Act. *Peoples Gas Light and Coke Co. v. Ames*, 359 Ill. 152 (1935).

So in the case cited in your letter where the City purchases chlorine for the purpose of purifying the water which is furnished as a "service"

to its citizens, it purchases that commodity for use and not for resale, and the dealer who sells it to the City and not the City must account to the State for the tax thereon.

Of course under the rule cited above the dealer may add the tax to the cost of the commodity as a separate item, or the City may by agreement assume the tax. If the City buys material for use and consumption, the dealer selling the material is primarily responsible for the tax.

This office in an opinion in 1937 held that the sale by the City at cost of publications, such as the Municipal Code, and printed pamphlets containing excerpts from the City's ordinances such as the zoning ordinance, the building code, the electrical and plumbing codes, etc., is not subject to the Retailers Occupation Tax. We held that in selling copies of these publications at cost, the City is not engaged in the business of selling tangible personal property but rather in the exercise of its governmental functions of rendering service to its citizens. (Opinions of Corporation Counsel, Vol. XIX, p. 387.)

In *People's Drug Shop, Inc. v. Moysey*, 384 Ill. 293 (1943) a suit by a dealer to compel a customer to pay the occupation tax as a separate and distinct charge to the agreed price of merchandise sold, our Supreme Court held that the plaintiff was without legal authority to collect from its customer, the defendant, the items representing additional charges for retailers occupation tax.

B. MANAGEMENT OF CITY FUNDS

BRIDGE BOND SURPLUS

(No. 10785—Commissioner of Public Works—J. F. G.—May 16, 1944.)

A proposed ordinance authorizing the creation of a bridge bond surplus account to expend surplus money from bridge construction on surveys and preliminary matters for bridges not otherwise provided for, would be invalid in view of statutory provisions to the effect that such monies be returned to the corporate fund.

Citations: IRS, '43, ch. 24, sec. 15-17.

OPINION OF FOREGOING SYNOPSIS

We have examined draft of proposed ordinance submitted by you designed to set up a "Bridge Bond Surplus Account" and to transfer to said account \$17,000 from the S. Halsted Street Bridge Bond Fund, Account 477-X-71. The ordinance also authorizes the Commissioner of Public Works to cause surveys and preliminary plans to be made for the construction of bridges not otherwise provided for and to charge the cost thereof against the Bridge Bond Surplus Account. Apparently it is intended to expend this money in the current year of 1944.

Section 15-17 of the Revised Cities and Villages Act authorizes the City Council to transfer any surplus of the proceeds from the issue and sale of bonds authorized prior to January 1, 1935 (1) to the corporate fund for the construction of bridges, for replacement of police or fire stations, and the extension of the street electric lighting system, or (2) to the bond and interest fund for the payment of principal of and interest on outstanding bonds.

The authority to transfer a surplus of \$17,000 from the S. Halsted Street Bridge Bond Fund to the Corporate Fund for the purposes enumerated in Section 15-17 may be made at any time but no money in the Corporate Fund earmarked for any purpose may be expended without an appropriation which must be made in the annual appropriation ordinance.

The proposed ordinance would be invalid if passed. If it is desired to transfer the amount indicated to the Corporate Fund, we direct your attention to the fact that there is in the annual appropriation ordinance for the year 1944 a Corporate Bond Surplus Account (564-S-60) to which the surplus available in the S. Halsted Street Bridge Bond Fund may be transferred without authority to expend the same until the passage of the next annual appropriation ordinance when an appropriation of \$17,000 could be made from said account for surveys and preliminary plans for the construction of bridges not otherwise provided for.

CONGRESS STREET SUPERHIGHWAY

(No. 10824—City Comptroller—M. J. N.—November 17, 1944.)

Money collected by the City through rental of real estate acquired in purchasing right of way for the proposed Congress Street Superhighway should be deposited to the credit of the general fund.

Citations:

- Statute: IRS '43, Ch. 24, Sec. 23, pars. 1, 15, 27, Ch. 120, Secs. 124 to 426½.
Cases: 273 Ill. 124.
278 Ill. 506.

OPINION OF FOREGOING SYNOPSIS

We reply to your letter of May 1, 1944, in which you enclosed a communication from the State Highway Engineer relative to disposition of moneys collected by the city as rental of real estate acquired in purchasing right-of-way for the proposed Congress Street Superhighway. This communication suggests that moneys collected by the City of Chicago as rent from property on Congress street, which was acquired by the city for right-of-way and paid for with Motor Fuel Tax funds, be credited to the Motor Fuel Tax Fund of the City of Chicago.

You advise that your office has proceeded on the assumption that once title to property is taken by the city any subsequent income belongs in the general fund and that you have temporarily deposited this money in a special fund, having anticipated that the State might possibly raise a question as to the disposition thereof.

You ask us to advise as to the proper method of handling these moneys.

Mr. W. W. Polk, Chief Highway Engineer of the State's Department of Public Works, in his letter on behalf of the department and in support of the department's contention, refers to the statute (Ill. Rev. Stat., Chap. 120, Secs. 124 to 426½, pp. 2651 to 2653), and a number of interest cases, with special attention to *County of Lake v. Westerfield*, 273 Ill. 124.

We read the statute and the cases cited and have given full consideration to the discussion of the subject by Mr. Polk, but we cannot arrive at the same conclusion.

We agree, the statute provides that money received by the Department of Revenue under the Act, shall be deposited in a special fund in the State Treasury, known as the "Motor Fuel Tax Fund" and that one-third thereof shall be apportioned to the several municipalities of the State (Ill. Rev. Stat., Chap. 120, Sec. 424, p. 2651). Once the money is apportioned to the several municipalities the only concern therein left to the State is that the money be used and accounted for by the respective municipalities, according to law (Ill. Rev. Stat., Chap. 120, Sec. 426½, p. 2653). However, once the money is lawfully spent and accounted for to the State Department of Public Works, the State no longer has any interest in the municipalities' portion of the fund.

There is no contention that the purchase of real estate by the City of Chicago with Motor Fuel Tax funds in connection with the Congress Street Superhighway was not effected according to the statute. This done and the city having taken title to the property in compliance with the statute, the provision in the statute for the use and accounting of the money is satisfied. The real estate is now the property of the City of Chicago and the State has no interest in the real estate whatsoever. True, the purpose of the purchase of the real estate is for the ultimate improvement of a State highway, but that portion of the State highway which lies within the City of Chicago is also a street and the property of the City of Chicago and the city has a right to regulate and license the use of that street (Ill. Rev. Stat. 1943, Chap. 24, Sec. 23, Pars. 1-15-27, p. 406). (*City of Geneseo v. Illinois Northern Utilities Co.*, 278 Ill. 506 (1941), at page 520.)

Certainly it will not be contended that it is necessary for the city to deposit to the credit of the Motor Fuel Tax Fund income from licenses or franchises pertaining to the use of Congress street, either now or after the improvement is completed, because Motor Fuel Tax funds are used in the improvement of the street. Neither can it be contended that income from real property, lawfully acquired by the City of Chicago with Motor Fuel Tax funds in connection with the same improvement, should be deposited to that fund.

It is difficult to see how the interest cases mentioned by Mr. Polk are even remotely analogous to the matter at hand. These cases involve the collection of interest from banks for deposits of State funds. The State never transferred ownership of these funds. The men charged with safeguarding these funds collected interest on deposits and while the statute gave no authority to collect interest, once collected, the Supreme Court held that the interest followed the fund.

We are therefore of the opinion that moneys collected by the city as a result of the rental of real estate acquired in purchasing right-of-way for the proposed Congress Street Superhighway should be deposited to the credit of the general fund.

SUPERHIGHWAY

(No. 10854—Acting Commissioner, Subways and Superhighways—
W. H. S.—August 8, 1945.)

Money collected by the Comptroller for rental of the Congress Street properties and kept by him in a separate fund may not be used to pay contractors for wrecking buildings. The proposed wrecking of the vacant and hazardous buildings is in furtherance of the purposes for which the properties were condemned, i. e. the building of the Congress Street Superhighway, and with the proper authorization of the City Council may be paid from the Motor Fuel Tax Fund.

OPINION OF FOREGOING SYNOPSIS

In your letter of August 4, 1945 to the Corporation Counsel you state that on some of the properties west of the Chicago River acquired by the City for the Congress street superhighway are "buildings which are not being lived in and have been boarded up or are in such a state of disrepair as to render them unfit for human habitation." You ask our advice "as to whether the money collected by the Comptroller for rental of the Congress Street properties and kept by him in a separate fund may be used to pay the contractor for wrecking these buildings."

On April 3, 1945 the City Council passed an ordinance authorizing the Comptroller to take supervision over any properties which may be acquired in connection with that section of the Congress street project extending west from the Chicago River and

"to appoint managing agents for said properties; to deposit all revenues received in a special deposit fund; and to charge against said fund all expense for repairs, management and operation of said properties." (C. J. p. 3198).

The expenses for repairs, management and operation authorized to be paid from the said special deposit fund we understand to include only such as are incurred in the usual management of real estate properties. The expense of wrecking a building therefore in our opinion is not a proper charge against the special deposit fund authorized by the ordinance passed on April 3, 1945.

The proposed wrecking of the vacant and hazardous buildings appears to us to be in furtherance of the purposes for which the properties were condemned, the building of the Congress street superhighway, and with the proper authorization of the City Council may be paid from the Motor Fuel Tax Fund.

BOND ISSUE EXPENSE

(No. 10921—City Comptroller—J. F. G.—October 28, 1946.)

Each bond fund of the City is properly chargeable with the expense incidentally incurred in the issuance of the bonds which produced the fund.

Citation:

Case: 81 SE 1072, 1074 (No. Car.).

OPINION OF FOREGOING SYNOPSIS

Reference is made to your inquiry as to whether the cost of advertising the sale of bonds, the printing of the bonds, and legal opinions as to the validity of a bond issue are chargeable to the bond funds.

There is no published opinion of this department upon the subject. We have made a careful search of court decisions and have found no cases in Illinois in which this question has been raised. Our search discloses only one case which seems to be pertinent to the subject and that was decided in the year 1914 by the Supreme Court of North Carolina. The opinion of the court in that case, *Le Roy v. Elizabeth City*, 81 S. E. 1072, is somewhat indirect upon this question, but, nevertheless, sound in principle. The General Assembly of North Carolina passed an Act authorizing the Board of Aldermen of Elizabeth City to issue bonds for the erection of a market house, town hall, auditorium and mayor's office, and for the equipment of said building. It was provided that the bonds shall not be sold for less than par and the proceeds arising therefrom shall be held for the purpose set out in the Act. It appears that the Board of Aldermen contracted to sell the bonds at an amount of \$250 less than par with which amount the town agreed to pay the expense of printing and attorneys' fees. Among other objections to the validity of the bonds it was contended that the agreement to pay for printing and attorneys' fees was an express violation of the Act authorizing the bond issue. The court said (page 1074):

"It appears that the defendant has agreed to sell the bonds at par, and, as we have before said, the use of the proceeds improperly would not render the bonds invalid. We are of the opinion, however, that reasonable expenses incurred in issuing the bonds are incident to the purposes of the act, and would not be a misappropriation of the funds, * * *."

We have been reliably informed that municipalities and other public agencies throughout the country frequently have made arrangements in one way or another either to sell their bonds with the provision that the purchasers pay the expenses involved or that such expenses be paid from the proceeds of the sale of the bonds by the issuing authority. In our opinion, either method of providing for the payment of such expenses accomplishes the same result and there should be no difference as to the legality of the procedure. The paucity of legal adjudications upon the subject no doubt is due to the fact that these expenses are generally accepted as proper charges against the bond funds. At least there have been no objections to such charges in any litigation excepting in the case cited so far as we have been able to discover.

The rule is that the proceeds of a public bond issue may be used only for the purposes stated in the act authorizing the issue and sale of the

bonds but, in a proper sense, the sale price does not necessarily represent the proceeds of the issue. It includes the cost of sale which the purchaser pays indirectly through the issuing agency. This is especially true of the cost of furnishing legal opinions as to the validity of the bond issue which the purchaser requires as a condition of the purchase to make it marketable or negotiable.

We conclude that each bond fund is properly chargeable with the expenses incidentally incurred in the issue and sale of the bonds which produced the fund.

TRANSIT AUTHORITY BILLS

(No. 10927—Chairman, Chicago Transit Board—W. H. S.—November 14, 1946.)

There can be no legal objection to the City of Chicago permitting deferment of payment by the Chicago Transit Authority of bills rendered to it by the City until the proposal and plan of the Authority to purchase the local transportation properties of the Chicago Surface Lines and Chicago Rapid Transit Lines has been consummated.

Citations:

- Statute: IRS '45, Ch. 24, 15-2.
- Ordinance: Coun. J. p. 3643 et seq.—June 21, 1945.
- Cases: 340 Ill. 363, 368.
349 Ill. 304.
392 Ill. 77, 86, 87.
8 App. Div. 230 (N.Y.)
119 Ky. 235.

OPINION OF FOREGOING SYNOPSIS

In your letter of recent date you request our opinion as to the legal authority of the city of Chicago to permit deferment of payment by Chicago Transit Authority for bills rendered against it by the city until the Surface-Rapid Transit Plans have been consummated and also to make additional appropriations in the annual appropriation bill for the year 1947 to aid the Authority in its organization and administration and in planning the acquisition, construction and operation of local transportation facilities for public service.

Coincidentally with the approval on April 12, 1945 of the act creating the municipal corporation known as Chicago Transit Authority for public ownership and operation of a transportation system in the metropolitan area of Cook County the Governor of Illinois also approved an act amending section 15-2 of the Revised Cities and Villages Act. This amendment read as follows:

"During the year 1945, the corporate authorities may make additional appropriations of not more than One Hundred Thousand (\$100,000) Dollars to aid any political subdivision, municipal corporation or public authority of this state authorized to furnish any public

service in the municipality, in its organization and administration and in planning the acquisition, construction and operation of facilities for such public service."

This amendment was necessary as the city of Chicago had passed its annual appropriation bill in the first quarter of the year 1945 and thereafter could make only emergency appropriations in the year 1945.

On June 26, 1945 the city council passed an ordinance appropriating \$100,000 to the Chicago Transit Authority for the purposes contained in the above amendment to section 15-2 of the revised cities and villages act.

In the annual appropriation bill for the year 1946 the city appropriated to the Chicago Transit Authority \$62,000 payable from the Traction Fund for the same purposes (account number 366-S-10).

On June 21, 1945 (C. J. 3643 et seq.) the city authorized the Authority to use such space, employes, supplies and facilities of the Department of Subways and Superhighways as may be necessary to expedite its preliminary work of organizing and developing initial plants, with the provision that an accurate record be kept of the proportionate rent, time, supplies and facilities used by the Authority, and the cost thereof billed to the Authority. Your letter states that the total amount of these costs as of July 31, 1946 is \$22,743.27.

Your letter also states: "Assuming that actual payment of these accounts can be legally deferred until the Authority has completed its organization and planning, and has acquired and is operating the Surface and Elevated Lines, the remaining balance of the \$62,000 appropriation (\$22,500 as of August 21, 1946) plus \$26,541.76 due from the State of Illinois will finance the Authority until about December 31, 1946. The expenses of the Authority, exclusive of city charges, is running at the rate of approximately \$10,000 per month."

Your letter also states that the Plans for acquisition of Surface and Elevated Lines, as originally proposed by the City to the Federal Court and later assigned to and sponsored by the Authority, now have been approved by the District Court and the Securities and Exchange Commission; that the Surface Lines Plan has been confirmed by the District Court and appeals will be argued orally before the United States Circuit Court of Appeals in November 1946; and that confirmation of the Rapid Transit Plan is deferred pending the outcome of these appeals.

You also state that the Authority has under way negotiations with Chicago Motor Coach Company, South Suburban Safeway Lines, Inc., and Bluebird Coach Lines, Inc., all of which serve the city of Chicago directly or indirectly, and is hopeful that these systems can also be acquired and made a part of a comprehensive unified system in 1947.

The legal propositions involved in your present inquiry are no different now than they were when the emergency appropriation was made to the Authority on June 26, 1945 and when the item was included in the annual appropriation bill for the year 1946.

In sustaining the validity of the Metropolitan Transit Authority Act and the companion acts, the Supreme Court of Illinois in 392 Ill. 77, at pages 86 and 87, said:

" * * * The operation of public utilities by cities has been recognized as a public purpose. The Cities and Villages Act contains comprehensive provisions for the operation of a variety of public utilities. These have been upheld as within the power of the General Assembly (citing cases).

There can be little doubt that it was the intention of the General Assembly to organize the Authority for a municipal public purpose, i.e., to operate an adequate and modern transportation system suitable and adapted to the needs of the municipalities served by the Authority. This court has recognized the importance and necessity of adequate and modern transportation in the metropolitan area of Chicago. (*People v. City of Chicago*, 349 Ill. 304.) * * * Surely it requires no stretch of imagination on the part of the General Assembly to conceive that adequate transportation is necessary to the health, safety and public welfare of the people of that area.

A somewhat similar situation arose in the city of New York. The General Assembly of New York had provided for the creation of a commission for the purchase and construction of rapid-transit railways in that city. It provided for the issuance of a large amount of bonds which were to become the debt of the city of New York. The constitution of that State provided no city could incur any indebtedness except 'for city purposes'. The purposes of the commission there created were held to be city purposes. (*Sun Publishing Ass'n v. Mayor of New York*, 8 App. Div. 230.) It was in that case recognized, as a matter of judicial notice, that the health of the people depends to a not inconsiderable degree upon decent and convenient transportation between their homes and their places of business."

What is there said by the Supreme Court as constituting "a municipal public purpose" and "city purposes" of the Transit Authority is equally applicable to the city of Chicago.

In *Furlong v. South Park Commissioners*, 340 Ill. 363 our Supreme Court quoted with approval, at page 368, the following language from 119 Ky., 235:

"These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public, and that if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency but for the object which it serves. The test is in the end—not in the means."

The Authority will not be able to issue its revenue bonds and thereby acquire funds with which to acquire the existing transportation properties and to defray its operating expenses until the proposal and plan of the Authority (as assignee of the City) to buy the local transportation properties of the Surface Lines and Rapid Transit Lines have been consummated. The existing appeals will not be orally argued in the Circuit Court of Appeals until November 25, 1946 and that court will probably not render its opinion until after January 1, 1947. If the reorganization plan of the Authority is approved additional time will be required to hold the sale and to acquire physical possession of the properties.

Another important consideration to the city of Chicago is the grant of money by the United States to aid in defraying the cost of construction of the Initial System of Subways to be owned by the City. Reference is made by us to the following Grant Agreements between the United States of America and the City of Chicago:

(a) *Grant Agreement dated as of October 25, 1938*—grant \$18,000,000;

(b) *Amendatory Grant Agreement, dated as of November 20, 1940*, amending the Grant Agreement dated as of October 25, 1938—striking out the figure \$18,000,000 and substituting \$23,130,000; and

(c) *Second Amendatory Grant Agreement, dated as of May 15, 1946, amending the Grant Agreement dated as of October 25, 1938, as amended by the Amendatory Grant Agreement dated as of November 20, 1940—striking out the figure \$23,130,000 and substituting \$25,200,000.*

The grant of federal aid was conditioned upon the *unification of all local transportation facilities*, with universal transfer privileges and proper coordination of facilities to the end that unnecessary duplication can be eliminated the best use of all facilities fostered. (See item (a) above; part I, 9, f, (ii))

The successful attainment by the city of the unification of the Surface Lines and Rapid Transit Lines operative properties together with other local transportation systems in the city is therefore of vital importance to the city.

On September 20, 1943 the so-called Sidley Committee appointed by the District Court on June 23, 1942 reported on the appeal from the order of the Illinois Commerce Commission denying Chicago Transit Company the right to take the necessary steps to unify the properties of Chicago Surface Lines and Chicago Rapid Transit Company and accept the ordinance passed by the city council of the city of Chicago and adopted at referendum on June 19, 1941. The committee referred to the proposal for the separate reorganization of the two systems "as a step toward complete integration and unification of all local transportation facilities within the Chicago metropolitan area." (Vol. XI, Receivership Record, Consolidated Cause No. 6839, pages 9700-9702.)

On October 4, 1943 Philip B. Fleming, Federal Works Administrator, presented to the District Court in Proceedings for Reorganization of Rapid Transit Company No. 65037, and in Surface Lines equity cases No. 9915 and No. 6839 a formal statement which, in part, is as follows:

"As Federal Works Administrator I am charged with the responsibility of carrying out the Government's obligation under the Grant Agreement between the City of Chicago and the Government pursuant to which a grant of \$23,130,000 has been made available for the construction of the Chicago subways. In addition, it is my duty to see that the City of Chicago fulfills its obligations under such Grant Agreement. Over \$15,000,000 of the grant has been paid to the City, leaving a balance of over \$7,700,000 still unpaid.

I believe it is proper to review briefly the circumstances under which the Government made this grant allotment to the city. In 1938 the City of Chicago submitted to the Public Works Administration its application for Federal funds to finance the construction of a system of subways. In such application the City advised the Government that it was actively engaged in formulating a traction program involving the adoption of a new franchise ordinance, the unification of the local transportation companies, and the modernization and extension of the local transportation facilities. More definite assurances regarding the operation of the subways were deemed necessary by the Government. Thereupon, officials of the City and prominent local businessmen pledged their support of unification. On October 4, 1938, the receivers of the Surface Lines and the trustees of the Elevated Lines filed petitions in this court in which it was asserted that there was reason to believe that plan of reorganization and a franchise ordinance could be worked out which would assure the establishment 'of a comprehensive unified local transportation system for the City of Chicago' incorporating as a part thereof the subways to be constructed and owned by the city.' Judge Wilkerson, upon the basis of such petitions, entered appropriate orders, finding that there was

reason to believe that an acceptable comprehensive local transportation plan could be consummated by the time the subways were completed. In these orders it was provided that if the Public Works Administrator should approve the subway application of the city and the proceedings for unification of the local transportation facilities should not be completed by July 1, 1939, then the receivers and the trustees were authorized and directed to enter into an agreement with the City of Chicago for the use of such subways when completed in a manner consistent with *any plan for a comprehensive unified local transportation system.*

These various assurances prompted the Administrator of the Public Works Administration to recommend to the President of the United States that a grant allotment be made for the Chicago Subways. The recommendation was supplemented with a detailed statement informing the President of the traction situation in Chicago, of the assurances that had been received from the City and others respecting the proposed solution of the traction problem, and of the enthusiastic support the subway project had received from the people and newspapers of Chicago.

The events leading to the making of the Government's grant and the provisions of the Grant Agreement definitely indicate that the grant was made in expectation of the unification and modernization of the local transportation facilities in the City of Chicago and the operation of the subways as part of such unified and modernized transportation system. * * *

I cannot agree with the committee's view that the reorganization of the Surface Lines and of the Rapid Transit Company as separate entities can be a step toward unification. It appears to me that any separate reorganization actually will constitute a decisive step at variance with unification. Once the surface and elevated lines remove themselves from the jurisdiction of this court through separate reorganizations, I fear that the attainment of unification may be seriously retarded for many years.

The City of Chicago in no uncertain terms has enunciated its firm adherence to the policy of refusing to grant a franchise ordinance for local transportation purposes except upon the basis of the unification of the local transportation facilities. The reorganization of the surface lines and of the elevated lines as separate entities without city franchises promises only a continuation of the present type of service with old and inadequate equipment. These public utilities, lacking franchise rights, cannot hope to obtain the necessary capital with which to carry out the improvement program deemed essential for rendering adequate transportation services for the people of Chicago. * * *

We can appreciate the desire to terminate receivership and bankruptcy proceedings that have been pending for so many years. But the attainment of unification is more important than the termination of the court proceedings. The City of Chicago is still working for unification. We believe that such endeavors of the City should not be impeded through separate reorganizations. No step should be taken which is not in harmony with the accepted objective of unification. The reorganization of the elevated and surface lines as separate entities is not consistent with the assurances of unification which induced the Government to make the grant for the subway project. It endangers the ultimate achievement of unification, impedes the carrying out of the modernization program, retards the extension of the city's subway system, hinders the proper operation of the subways, and prejudices the payment of the Government's grant to the City.

The action proposed is fraught with such serious consequences that I cannot refrain from voicing an emphatic objection." (Vol. XI—Receivership Record, Consolidated Cause No. 6839, pages 9746 et seq.)

On April 25, 1941 Mayor Kelly filed in the Proceedings in the District Court certain suggestions. (Vol. IX—Receivership Record, Consolidated Cause No. 6839, page 7507.)

Among other matters he stated (at page 7511):

"On November 3, 1938, the City of Chicago entered into a Grant Agreement with the United States whereby the Government agreed to donate to the City, the sum of \$18,000,000 to be applied toward the cost of a system of subways, on condition that provision be made for unification of the local transportation facilities of the City. Since that time the amount of the Government's grant commitment has been increased to \$23,140,000. Of this amount there remains unpaid \$13,000,000 which the City is in jeopardy of losing unless the requirement for unification can be met."

On September 23, 1943 on motion of Alderman Quinn, the city council by a unanimous vote passed an order directing the corporation counsel

"* * * to inform the Court that because of its urgent need for city-wide modern local transportation, the City cannot honestly or logically give consideration to the granting of any transit franchise that does not require unified operation and city-wide modernization of all forms of local transportation."

In Mayor Kelly's communication to the city council under date of September 29, 1943 and filed on October 4, 1943 in the traction cases in the District Court (Vol. XI, Receivership Record, Consolidated Cause No. 6839, pages 9752 to 9770) the Mayor stated (at page 9755):

"Since 1916, unification of its transit facilities has been the settled policy of the City of Chicago. Every administration from that time to this, has recognized this inescapable necessity."

We have quoted somewhat at length in respect to the Grant Agreements with the Government because of the gravity of the situation thus presented.

The City has a vital concern in carrying out its obligations contained in the Grant Agreements. Unification and modernization have been the cornerstone of each ordinance passed by the city council and approved on referendum and culminating in the ordinance to Chicago Transit Authority passed by the city council on April 23, 1945, approved by the Mayor of Chicago on April 30, 1945 and approved at the referendum held on June 4, 1945.

In our opinion an appropriation to Chicago Transit Authority by the city council of the City of Chicago is "for a municipal public purpose", is "for a city purpose" and specifically is a vital necessity in order to aid Chicago Transit Authority in acquiring the local transportation properties of Surface Lines and of Elevated Lines and enabling the Authority to unify and modernize the systems.

By so doing the city of Chicago will be adhering to its "settled policy", as so referred to by Mayor Kelly.

There can be no legal objection to the City of Chicago permitting deferment of payment by the Authority for bills rendered to it by the City until the proposal and plan of the Authority to purchase the local

transportation properties of Chicago Surface Lines and Chicago Rapid Transit Lines have been consummated and also to make additional appropriations in the annual appropriation bill for the year 1947 to aid the Authority in its organization and administration and in planning the acquisition, construction and operation of local transportation facilities for public service.

RATES FOR WATER OUTSIDE CITY

(No. 10932—Chairman, Finance Committee—J. F. G.—December 19, 1946.)

The City of Chicago will be unable to collect from the Village of Oaklawn after its annexation to the Sanitary District of Chicago any rates for water service in excess of those charged to consumers in the City of Chicago and other municipalities within the Sanitary District for water furnished through meters in large quantities.

Citations:

Statute: IRS '45, Ch. 42, Sec. 26, par. 348.

Cases: 210 Ill. 290.

215 Ill. 71.

271 Ill. 602.

290 Ill. 360.

292 Ill. 236, 252.

389 Ill. 298, 307.

171 SW 2d. 470 (Ark.).

97 L. Ed. 1015. (N.J.)

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of October 4, 1946, requesting our opinion as to the validity of a proposed contract for water supply to the Village of Oaklawn for a term of ten years at a rate of \$.761 per 1,000 cubic feet.

Section 26 of the Chicago Sanitary District Act (Ill. Rev. Stat. 1945, Chap. 42, Par. 348) provides in effect that the City of Chicago shall furnish water to any city, incorporated town or village within the Sanitary District which does not have its own waterworks system at no greater rate or charge than the City of Chicago collects from consumers within its limits for water furnished through meters in large quantities, provided that the applicant builds or causes to be built suitable and sufficient water mains to the city limits so that the water may be furnished at Chicago's boundary line. The validity of this section was upheld by the Supreme Court of Illinois in *City of Chicago v. Town of Cicero* (1904) 210 Ill. 290, as an exercise of the police power of the State in furtherance of the object of saving our water source from pollution by means of the operation of the Sanitary District to the construction and maintenance of which the taxpayers of the Sanitary District contribute.

The Village of Oaklawn is in Cook County outside of the corporate limits of the Sanitary District of Chicago and the rate fixed is in excess

of that charged to consumers within the city limits and to municipalities within the Sanitary District. The question which you wish to be determined is whether the rate fixed in the proposed contract will govern the charges for water furnished to the Village in the event of its annexation to the Sanitary District.

The Chicago waterworks was originally authorized by special charter of the City (Chapter XV), approved February 13, 1863, and in some respects the special charter provisions relating to this subject have never been repealed. *The People v. Hummel* (1905) 215 Ill. 71; *The People v. Bränd* (1945) 389 Ill. 298, 307. However, express provision has been made for the operation of the water plant owned by the City as a public utility governed by the provisions of Article 49 of the Revised Cities and Villages Act. The charges for the service of such a utility must be reasonable and nondiscriminatory as to any class of customers within substantially the same distance, location and expense of delivery. *Pond, Law of Public Utilities*, 4 ed., Volume 1, Section 280; *Springfield Gas Co. v. Springfield* (1920) 292 Ill. 236, 252; *City of Malvern v. Young* (Ark. 1943) 171 S. W. 2nd, 470.

Except for the obligations imposed upon the City by Section 26 of the Chicago Sanitary District Act, the City is justified in charging municipalities and private persons and corporations outside its own corporate limits a reasonable rate in excess of those charged to consumers within the city. Therefore, municipalities not within the Chicago Sanitary District may be charged for water service at a higher rate than municipalities within the Sanitary District even though there is no substantial difference between such municipalities in distance, location and expense of service. Nevertheless, the City may not insist upon the higher rate after the municipality receiving the supply of water is annexed to the Sanitary District merely because of an unexpired contract obligation.

The City has no power to bind itself by agreement for a term of years to a fixed rate for water service. The power to fix and regulate rates for public utilities is a continuing police power under State control. *Normal School v. City of Charleston* (1916) 271 Ill. 602; *Public Utilities Commission v. Quincy* (1919) 290 Ill. 360.

The City cannot invoke the provision in the federal constitution prohibiting the State from impairing the obligations of a contract. *Trenton v. New Jersey* (1923) L. ed. 937; *Williams v. Baltimore* (1932) 97 L. ed. 1015.

We are of the opinion that the City of Chicago will be unable to collect from the Village of Oaklawn after its annexation to the Sanitary District of Chicago any rates for water service in excess of those charged to consumers in the City of Chicago and to other municipalities within the Sanitary District for water furnished through meters in like large quantities.

SNOW REMOVAL FUNDS

(No. 10995—Commissioner, Streets and Electricity—M. H. F.—September 10, 1947.)

Money from the wheel tax fund may be expended for essential maintenance purposes. Snow removal is such a purpose.

Citations:

Statute: IRS '45, Ch. 24, 23-13, 23-53, Ch. 95½, 32a.

Ordinance: Municipal Code, 29-12.

Cases: 283 Ill. 550.

Other reference: 18 Op. Corp. Counsel 650.

OPINION OF FOREGOING SYNOPSIS

Your communication of August 25, 1947 states that your department is giving consideration to the matter of calling for the appropriation of funds received under the city's Wheel Tax License ordinance, chapter 29, Municipal Code of Chicago, for use in snow removal and street cleaning, and you ask our advice as to the legality of the proposed action.

Section 29-12 of that ordinance allocates all revenue derived from license and transfer fees to paying the cost of street and alley improvement and repair. It provides:

"All revenues derived from license and transfer fees shall be kept as a separate fund and used for paying the cost of street and alley improvement and repair. Such revenue shall be used in the manner provided for in the annual appropriation bill or in such other manner as the city council may by ordinance direct."

By section 23-13 of the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes, the city has been granted express power "to provide for the cleaning of streets and other municipal property."

The principal sources of power to enact the Wheel Tax ordinance are found in section 23-53 of the Revised Cities and Villages Act, chapter 24, Illinois Revised Statutes, and in section 32a of the Motor Vehicle Act, chapter 95½, Illinois Revised Statutes.

Section 23-53 reads as follows:

"To license, tax, and regulate all vehicles conveying loads within the municipality. The net revenue from these vehicle licenses, after deducting the actual cost and collection of disbursement thereof, shall be used for improving, paving, repairing, and maintaining the streets and other public roadways of the municipality. But in municipalities of more than 3,000 inhabitants not more than fifteen per cent of the annual gross revenue from these vehicle licenses may be used for payment of salaries and wages of policemen engaged in regulation of traffic and in municipalities of 40,000 or more inhabitants the net revenue from these vehicle licenses may be used also for the construction, maintenance, and operation of testing stations for the inspection of motor vehicles."

After regulating the amount of the wheel tax to be paid, and authorizing any city, village or town of 40,000 or more inhabitants to use tax monies for the construction, maintenance and operation of testing stations for the inspection of equipment of motor vehicles, section 32a of the Motor Vehicle Act provides in part as follows:

"The balance of such funds in cities, villages and towns of 40,000 or more inhabitants, * * * shall be used for the purpose of improving, paving, repairing or maintaining the streets and other public roadways within such city, town or village and shall never be devoted to any other use whatever; provided, that the actual cost of the collection of such fees and the disbursement thereof may be deducted from the total amount collected; and provided, further, that in cities and

villages of more than 3,000 inhabitants, not to exceed fifteen (15%) per cent of such license fees may be used also for payment of salaries and wages of policemen engaged in the duty of regulating traffic."

Prior to December 20, 1935, when it was amended at the First Special Session of the Fifty-ninth General Assembly (Laws of Illinois, 1935, First Special Session, page 30), to provide that the license fees might be used for the purpose of "improving, paving, repairing or maintaining the streets and other public roadways," what is now section 23-53 of the Revised Cities and Villages Act (then section 96 of Article V of the Cities and Villages Act) provided that the fees should be "used only for paying the cost and expenses of street and alley improvement or repair".

What is now section 29-12 of the Municipal Code of Chicago was enacted prior to the amendment to the statute in 1935 and when the statute employed the words merely "street and alley improvement or repair". See section 2070 of the Revised Chicago Code of 1931.

Interpreting section 2070 of the 1931 Code in connection with the Cities and Villages Act and the Motor Vehicle Act then in force, this department in an opinion rendered October 8, 1931, Opinions of the Corporation Counsel, Volume XVIII, page 650, advised the Mayor that the wheel tax fund could not be used for street cleaning. As no mention was made of the removal of snow and as the writer of the opinion relied upon authorities holding that the sprinkling of a street was not a local improvement within the meaning of the statute authorizing municipalities to make local improvements by special assessments, it is assumed that the views expressed related to the use of the fund for mere street sprinkling and ordinary street sweeping to allay or remove dust.

At the present time both section 23-53 of the Revised Cities and Villages Act and section 32a of the Motor Vehicle Act authorize the city to use vehicle license fees for improving, paving, repairing and maintaining streets and other public roadways of the municipality.

While definitions of the word "maintain" are to be found which interpret the word when used in connection with streets to be synonymous with "keep in repair," such would seem to be too restrictive to give the word its full significance and meaning when used to amend a clause already containing the word "repair". Webster's International Dictionary defines the word "maintain" as meaning to hold or keep in any particular state or condition, especially in a state of efficiency. In 17 Encyclopaedia Britannica (1911) the word "maintenance" is defined to mean the act of keeping efficient or in working order. Hence, there is basis for the belief that when the legislature changed the language of section 23-53 from "used only for paying the cost and expenses of street or alley improvement or repair" to "used for the purpose of improving, paving, repairing or maintaining the streets and other public roadways," and added the word "maintaining" to the words "improving, paving, repairing," it intended to enlarge the powers conferred by the words last quoted. If "maintain" meant nothing more than "improve" or "repair", then there was no purpose in adding the word "maintaining". When construing a statute every word should, if possible, be given a meaning. (*Ruda v. Industrial Board* (1918), 283 Ill. 550.

The streets and public roadways of a great city like Chicago are its arteries of travel and communication. When rendered unusable or partially unusable by a heavy downfall of snow, if the snow be not promptly removed, certainly the streets would not be maintained in a state of efficiency as highways for travel and communication. Frequently, one heavy fall of snow follows another. If snow be not removed promptly it becomes more difficult and more costly to remove it. While snow piles and drifts remain vehicular and even pedestrian traffic is made difficult and

owners of property abutting the streets have only limited access thereto. Business activity is retarded and the welfare of the entire city and its inhabitants injuriously affected. Even those who pay fees into the wheel tax fund are prevented from using their motor vehicles on the streets and enjoying the privilege for which they pay. Again, if snow and ice are allowed to remain indefinitely on the street pavements the resulting effects of thawing and freezing are destructive to the physical structure of the pavements and mean costly and more frequent repairs thereto. In other words, the repairs for which the fund unquestionably may be used would be less extensive and less costly when snow and ice are expeditiously removed.

Our conclusion, therefore, is that when the legislature wrote into the statutes the word "maintaining", thereby adding to mere physical repair, it did so intending to enlarge the power of municipalities and permit them to use the wheel tax fund for the maintenance of streets and other public roadways over and beyond mere repairs to the physical structures of such public ways, and it sanctioned municipalities to use the fund to pay the cost and expense of such essential maintenance as snow removal.

We would not, however, wish to be understood by anything said herein, to express the view that the wheel tax fund might properly be used for the mere sprinkling of streets or dust sweeping.

Of course, before monies are appropriated from the wheel tax fund it would be necessary that the city council first amend section 29-12 of the code by changing the words "improvement and repair", to read "improvement, repair and maintenance." There is transmitted herewith a draft form of ordinance which if enacted would effectuate this change.

VEHICLE TAX FUND

(No. 11004—Alderman, 45th Ward—J. F. G.—October 24, 1947.)

The Vehicle Tax Fund authorized uses fall into four general categories:

1. Administrative costs of the Fund.
2. Improving, paving, repairing and maintaining streets and other public roadways.
3. 15% of the fund may be used for payment of salaries of police officers regulating traffic.
4. Construction maintenance and operation of testing stations for the inspection of motor vehicles.

Citations:

Statute: IRS '45, Ch. 24, 23-53, Ch. 95½, Sec. 32a.

Other references: 5 Op. Corp. Coun. 110.
13 Op. Corp. Coun. 109.
18 Op. Corp. Coun. 650.
18 Op. Corp. Coun. 722.

OPINION OF FOREGOING SYNOPSIS

We have carefully considered your request for an opinion as to the specific purposes for which the vehicle tax fund may be expended. Your reference to Chapter 120 of the Illinois Revised Statutes no doubt is an error. That chapter relates to the motor fuel tax fund. The pertinent statutory provisions are Section 32a of Chapter 95½ relating to motor vehicles and Section 23-53 of the Revised Cities and Villages Act. These two sections are in *pari materia* and their provisions as to the use of the fund do not differ.

It is difficult to anticipate all the specific uses of the vehicle tax fund authorized by law. Each appropriation should be considered on its merits in the light of the facts to determine if it is reasonably related to the general purposes for which the tax is imposed.

In general, the authorized uses fall into four categories as follows:

1. To pay the cost of collection and disbursement of the fund. This may include such costs as for printing and issuing licenses, license plates, keeping records, accounting, supervision and general overhead.

2. To pay for improving, paving, repairing and maintaining streets and other public roadways. There are wide differences of opinion as to the scope of this category. You have directed us to an opinion of the late Leon Hornstein, First Assistant Corporation Counsel, dated October 8, 1931, published in abstract form in the Opinions of the Corporation Counsel, Vol. XVIII, p. 650. We have examined a full copy of that opinion. The question then was: "Can the City of Chicago defray the expense of cleaning its streets and alleys out of the wheel tax fund?" Unquestionably the conclusion that the City cannot defray the expense of cleaning its streets and alleys out of the vehicle tax fund is correct, but we are constrained to adopt a broader view of the scope of this subject. The argument made in that opinion was that the word "maintaining" then used in the Motor Vehicle Act was limited by the doctrine of *ejusdem generis* to paving and repairing. That interpretation may have been justified in the light of the language of the Cities and Villages Act then in force which provided that the "license fees when collected are to be kept as a separate fund and used only for paying the cost and expenses of street and alley improvement or repair". Nevertheless the opinion seems to be inconsistent with his opinion dated June 6, 1924 sustaining an appropriation for installing street lights (O.C.C., Vol. XIII, p. 109). It is also inconsistent with his opinion of January 7, 1932 holding that the City Council may appropriate a portion of the wheel tax fund for the repair and maintenance of street signs (O.C.C., Vol. XVIII, p. 722). Since the opinion to which you referred was rendered the Cities and Villages Act was revised by an Act approved August 15, 1941. Section 23-53 of the Revised Cities and Villages Act is now identical with the language of the Motor Vehicle Act in this respect and it is our opinion that "maintaining streets" is not limited to paving and repairing them. Thus, the vehicle tax fund may be used not only for improving, paving and repairing streets but also for their maintenance in the broadest sense, as in the case of oiling roadways for their preservation (O.C.C., Vol. V, p. 110) or controlling traffic to divert heavy loads from streets where the pavements are inadequate to carry such loads. It is conceivable even that the cost of clearing roadways of accumulation of substances which are injurious to pavements may properly be charged to the vehicle tax fund. This demonstrates what we have said before that we cannot determine in advance without considering the merits of any expenditure whether it is justifiably chargeable to the vehicle tax fund.

3. Fifteen percent of the gross revenue from vehicle licenses may be used in payment of the salaries of police officers regulating traffic.

4. The revenue from these licenses may also be used for the construction, maintenance and operation of testing stations for the inspection of motor vehicles. This, of course, includes all such expenses of operation as the cost of materials, supplies, equipment, furnishings, office supplies and certificates of inspection.

All of the categories involve a certain amount of supervision and general administration expenses which no doubt are properly chargeable to the vehicle tax fund.

REPAIRING BREAKWATER

(No. 11090—Chairman, Finance Committee—J. F. G.—December 7, 1948.)

The cost of repairing a breakwater in Lake Michigan which protects a City beach and playground is a legal expenditure from the Playground Bond Issue Account.

Citation: C. J. April 8, 1946, p. 5602.

OPINION OF FOREGOING SYNOPSIS

Your letter of November 30, 1948 requests our opinion as to whether the cost of repairing the breakwater which protects the Touhy Avenue Beach and Playground situated along the lake line of Michigan Avenue, North of West Tuohy Avenue is a legal expenditure from the Playground Bond Issue Account 484-X-72.

It is our opinion that this expenditure is a proper charge to the aforesaid account.

The ordinance authorizing the playground bond issue *inter alia* reads as follows:

"Section 1. For the purpose of constructing, equipping and improving playgrounds and acquiring land necessary therefore are authorized to be issued playground bonds * * *" (C. J. April 8, 1946, p. 5602).

The expenditure which can be made from this bond fund depends upon the meaning of the phrase "constructing, equipping and improving playgrounds". The question resolves itself as to whether or not the meaning of the word "improving" as used in the aforesaid ordinance, includes the cost of repairing the jetties of the breakwater so that further damage to an existing playground is prevented and so it may be put to the purposes and uses for which it was intended. The word "improve" has been defined as meaning, to make better; to increase the value or good qualities of anything; to use or to employ to a good purpose; to make productive or to turn to profitable account; to use to advantage (Words and Phrases, Permanent Edition). In the instant case we are of the opinion that "improve" includes the performance of an act which will make a playground more usable by the public.

C. JUDGMENTS AND CLAIMS

ASSIGNMENT OF TAXICAB LICENSE

(No. 10751—Public Vehicle License Commissioner—P. J. L.—July 26, 1943.)

A City taxicab license is assignable. The City can accept the federal government's certificate of sale as an assignment of the taxicab license where the federal government has taken possession of such licenses in partial satisfaction of claims for taxes due the government from owners of the licenses.

Citations:

Statutes: U. S. Code—Title 26, secs. 3690, 3697.

Ordinances: Mun. Code—ch. 196-A-3.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 13, 1943 states that the Internal Revenue Department is having difficulty in making collections of taxes from certain taxicab operators and is contemplating the seizure of certain city taxicab licenses and selling the same at public auction in satisfaction or partial satisfaction of the claims for taxes due the Government. Our opinion is requested whether you could accept as an assignment a certificate of sale issued by the Collector of Internal Revenue conveying to the purchaser at the sale all rights, title and interest in a taxicab license.

The city's Taxicab Ordinance, chapter 196A, Municipal Code of Chicago, creates a limited property right in a taxicab license. Section 196A-3 reads as follows:

"Each taxicab license or the right to apply for such license shall be assignable subject to the power of the city of Chicago to determine the qualifications of the assignee to such license. No taxicab license shall be issued to any assignee unless and until such assignee shall have assumed all liabilities of the assignor arising from the maintenance and operation of any taxicab."

Under section 3690, Title 26, U. S. Code, the Collector of Internal Revenue is authorized to collect any taxes which a taxpayer neglects to pay with interest and other additional amounts required by law, by distraint and sale as provided by law of the goods, chattels or effects of the delinquent taxpayer. The act provides for notice which fixes the time of sale.

Section 3697 provides that in all cases of distraint and sale the certificate of such sale "shall transfer to the purchaser all right, title and interest of such delinquent in and to the property sold."

A city taxicab license being assignable, it is in our opinion subject to distraint and sale under the Internal Revenue Act. You should therefore accept the Government's certificate of sale as an assignment of the taxicab license subject to the provisions of the Taxicab Ordinance as you do

in the case of a voluntary assignment by the licensee. The Government, of course, would acquire no greater rights or privileges than those possessed by the licensee under the ordinance and could not by its certificate of sale convey to a purchaser anything more than the right, title and interest of the tax delinquent in and to the license.

REIMBURSING RAILROAD

(No. 10777—Chairman, Finance Committee—J. J. D.—April 19, 1944.)

The City is not obligated to reimburse a railroad for expenses incurred by them in protecting their tracks from possible injury resulting from the construction of a sewer under the tracks of the railroad.

Citation:

Statutes: IRS '41, ch. 24, sec. 65-88.

IRS '43, ch. 24, sec. 23-32.

Cases: 218 U.S. 336, 344-5.

324 Ill. 618, 621, 624.

51 Fla. 380.

50 Ohio St. 65.

OPINION OF FOREGOING SYNOPSIS

We have your inquiry of April 14, 1944 concerning city's liability to pay claim of the Illinois Central Railroad "for reimbursement of moneys expended to protect its tracks during the construction of the Thorndale Avenue Sewer under and across the railroad right-of-way at Lawndale Avenue" in the amount of \$1,402.93.

Our records show that Lawndale Avenue at this point was dedicated as a public street about June 10, 1890.

Our State Supreme Court has consistently held that in matters of this kind involving public interest there is no obligation on the municipality to reimburse the utility for the type of expense referred to. In the case of *The People v. Chicago City Railway Co.*, 324 Ill., page 618 at page 621, the court said:

"The city is under no obligation to conform its treatment of its streets to the construction of the company's road-bed, but, on the contrary, the company must conform the construction of its road-bed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers concerning the use, control, regulation and improvement of its streets."

And again on page 624 the court further said:

"All corporations thus occupying the streets take their grants from the city upon the condition that the city has reserved to it the full and unconditional power to make any reasonable change of grade or other improvement in its streets as the public necessity and convenience demand. *Columbus Gas Light and Coke Co. v. City of*

Columbus, 50 Ohio St. 65, 19 L.R.A. 510; *Anderson v. Fuller*, 51 Fla. 380, 6 L.R.A. (N. S.) 1026.

* * *

A review of the authorities shows that * * * a municipality cannot surrender its power to control and regulate its streets, and that it is not liable to companies having a right * * * to place their appliances in the streets for expenses incurred in readjusting their appliances to meet conditions created by the municipality in making public improvements to promote the public convenience and necessity * * *."

The Supreme Court of the United States in the case of *Cincinnati I. & W. Railway v. Connorsville*, 218 U. S. 336, on pages 344-5 said:

"The railway company accepted its franchise from the State, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority—within whose limits the company's business was conducted."

The section of the statute referred to in your letter, Chapter 24, Section 65:88 of the Illinois Revised States which you quote as follows:

"The city council shall have power by condemnation or otherwise to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right-of-way or land of any railroad company (within the corporate limit); but where no compensation is made to such railroad company, the city shall restore such railroad track, right-of-way or land to its former state, or in sufficient manner not to have impaired its usefulness,"

was revised in the year of 1941, which revision became effective January 1, 1942 and now reads as follows:

"Chapter 24, paragraph 23-32. STREETS AND SEWERS ACROSS OR UNDER RAILROAD.) The corporate authorities shall have power, by condemnation or otherwise, to extend any street or alley over or across, or to construct any sewer under any railroad track, or through the right-of-way or land of any railroad company. Where no compensation is made to the railroad company, however, the municipality shall restore the railroad track, right-of-way, or land so that its usefulness will not be impaired more than is reasonably necessary."

The conditions which brought about the installation of the sewer did not involve the extension of Lawndale Avenue across the right-of-way of the railroad company, but, on the contrary, had to do with the laying of a sewer in a public thoroughfare which had existed for a period of approximately 43 years prior to the date of the incurring of the expense upon which the railroad's claim is based. Under these facts this section of the statute has no application.

In view of the above law and facts, we are of the opinion that the city is not liable for payment of the claim referred to in your letter.

PAVING LIEN

(No. 10810—Alderman, 41st Ward—A. F. G.—August 21, 1944.)

A builder who acquires most of the property in a block and installs the requisite pavement in the entire block cannot get a lien for the proportionate cost of the pavement against an abutting property owner who did not consent to the improvement.

Citation: 37 C. J. 312.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of August 1, 1944 in reference to paving certain streets in the Hulbert Heights Addition to the City of Chicago. You state that persons interested in improving these streets are having difficulty in securing the cooperation of certain other property owners who are opposing the improvement. You say further:

"Since the pavement must be continuous according to the F.H.A. requirements, I would like to know if a builder, who acquires most of the property in a block and installs the requisite pavement in the entire block, can obtain a lien or assessment against those properties which do not contribute their share of the cost."

As a general rule a lien may arise or be created only with the consent of the owner of the property to which the lien attaches, that is, by a contract express or implied with the owner of the property, or some one duly authorized by him to create it, or it may arise without his consent by the operation of some positive rule of law, such as by statute. (37 Corpus Juris 312.)

We are unable to find in any statute in this State any provision which gives to a person voluntarily paving a street for an entire block, a lien for the proportionate cost of the pavement, against the property of an abutting owner who did not consent to the improvement.

We are, therefore, of the opinion that the builder referred to in the quoted excerpt from your letter would not have a lien against the property of an abutting owner unless such owner agreed to share the cost of such improvement.

SUBWAY JUDGMENTS

(No. 10912—City Comptroller—J. C. M.—September 24, 1946.)

Subway judgments are not controlled by the Judgment Tax Fund Act or its provision requiring judgments to be paid in order of rendition.

Citations:

Constitution: Illinois Constitution, 1870, Art. 2, Sec. 13.

Statute: IRS '45, Ch. 24, Sec. 22.14.

Ordinance: Municipal Code, 7-29.

Cases: 378 Ill. 454.

OPINION OF FOREGOING SYNOPSIS

In your letter of September 6, 1946 you state:

"On numerous occasions your office has certified judgments obtained for damages to property due to subway construction. These judgments are entered in accordance with terms of settlement previously approved by the City Council, which orders further provide that payment be made from Traction Funds.

"We would appreciate your opinion governing the payment of these judgments by this office immediately upon your certification, although such payment would not be in the order of entry."

Inasmuch as the judgments referred to are based upon the constitutional provision (Section 13 of Article 2) of the Illinois Constitution, which provides that:

"Private property shall not be taken or damaged for public use without just compensation,"

these judgments are not to be classified in the same category as judgments arising under contract or tort actions. Our Supreme Court has held that the provisions in the Judgment Tax Fund Act (Ill. Rev. Stat. 1945, Chap. 24, Sec. 22.14) and Section 7-29 of the Municipal Code of Chicago that judgments shall be paid in the order of their rendition are unconstitutional as to judgments involving the taking or damaging of private property for public use. *People ex rel. Wanless v. City of Chicago*, 378 Ill. 454, 1941).

It is therefore our opinion that judgments entered against the City of Chicago for damages to private property arising out of the construction of the subway which are, by council order, payable out of Traction Funds, are not controlled by the said Judgment Tax Fund Act or Section 7-29 of the Municipal Code of Chicago. If traction funds are available, the judgments may be paid at once.

FAULTY TRAFFIC SIGNALS

(No. 10938—Chairman, Finance Committee—C. N.—January 31, 1947.)

The City is not responsible for damages resulting from a collision at an intersection where the traffic signals were not functioning properly.

No references.

OPINION OF FOREGOING SYNOPSIS

The above claim has been submitted to us for an opinion as to the city's liability.

This is a claim for damage to automobile attributed by claimant to failure of stop and go lights to function properly at the intersection of Ohio and Dearborn streets, on February 9, 1946 at 10 P. M.

Claimant states only that he was involved in an automobile accident, without giving any account of attendant circumstances. He states in substance that because of the stop and go systems' failure to function properly, the driver of the other car proceeded on a green go ahead signal which should have been red, as claimant's car was also the recipient of a go ahead green signal at the same time. As a result, claimant contends the other car crashed into his machine.

Upon presenting his account of the circumstances to the insurance company, which appears to have been the insurer of both cars, claimant's claim was denied on the theory that the proximate cause of the accident was the failure of the lights to work properly. Acting upon the advice of the insurance company, claimant has presented his Council Claim for the damage to his machine.

We cannot concur with claimant's contention that the proximate cause of this accident was the failure of the lights to function properly.

The report of the Department of Streets and Electricity, explains only the manner in which the traffic control signals were set at this location and admits that mechanical failures of the control mechanism will occasionally cause a condition to exist where the go ahead or stop signal will be received temporarily by all cars approaching an intersection. If the drivers of cars were robots and the power for propelling their machines would be derived from the traffic lights, there would be full support for the contention that temporary failure of such lights to operate could be deemed the proximate cause of an accident. However, traffic lights and their action or failure to act constitute only one of many elements, the relations of which account for accidents. The failure of lights to operate may vary the degree of contributory negligence, if any, on the part of a driver of a car, but there always remains the duty imposed upon a driver to exercise due care and caution for his own safety and the safety of others.

Our courts frequently have stated that through streets are not speedways and the mere fact that a driver has an apparent right of way does not preclude the necessity for proceeding with due care and caution at all times.

For the reasons hereinabove fully discussed, we are of the opinion, therefore, that the City of Chicago is not liable for the damage to automobile herein claimed.

MUNICIPAL AIRPORT FENCES

(No. 10952—City Architect—E. L. W.—March 13, 1947.)

In the event that a child were injured because of the inadequacy of the present chain gates at the Municipal Airport the City would be liable.

Citations:

Cases:

- 154 Ill. 141.
- 256 Ill. 401, 406.
- 49 So. 556 (Fla.).
- 56 So. 696 (Fla.).
- 1 So. 2d. 614 (Fla.).
- 8 Pac. 2d. 783 (Ore.).
- 75 Pac. 2d. 977 (Ore.).
- 84 Pac. 2d. 166 (Cal.).
- 98 S.W. 2d. 394 (Tex.).

Other references: 12 Neg. Comp. Cases New Series 40.

45 Corp. Jur. 758, par. 155.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of a letter dated January 22, 1947 concerning the above subject in which you ask an opinion as to the liability of the City of Chicago and its administrative officers in connection with an alleged hazard existing on the field side of the Airport Terminal Building now being completed at the Chicago Municipal Airport.

We are advised by your letter that as a result of an agreement between representatives of the airlines and this office, a four-foot high wire fence was erected, separating the pedestrian walk alongside said Airport Terminal Building from the so-called apron area where airplanes park for loading and unloading; that the fence has openings at intervals to permit pedestrians as well as baggage handling, which openings are at present protected with a removable chain guard.

Your letter further advises that the airlines now request that chain guards be replaced by sliding gates, so as to protect against possible liability for accidents that may occur to the general public as a result of unauthorized persons gaining access to the field through these openings. You request our opinion as to what extent the City of Chicago and its officers would be liable if an accident occurs.

The first question presented for our consideration is to what extent or in what capacity a municipality is liable in the operation and maintenance of an airport. "The weight of judicial authority seems to hold that the operation of an airdrome by a municipality is a 'proprietary' function as distinguished from a governmental function." (*Pignec v. City of Santa Monica*, 29 Calif. App. 84 P. 2nd 166; *Mollencop v. Salem, Oregon*, 8 Pac. Ap. 2nd 783; *Blue v. City of Union, Oregon*, 75 P. 2nd 977; *Christian v. City of El Paso, Tex.*, 98 S. W. 2nd 394.)

The second question presented is whether removable chains guarding the openings in the fence described in your letter are sufficient protection to the public so as to protect the city from liability for injuries to the public caused by unauthorized persons gaining access to the field.

The city is required to exercise the same degree of care in the maintenance of its property as is imposed upon others who undertake to render

service or furnish accommodations to the public; that is, "the law imposes a duty to use proper care, precaution, and diligence in providing and maintaining the accommodations in a reasonably safe condition for the purposes to which they are adapted, and are apparently designed to be used. If the accommodations for any reason are not reasonably suitable and same for the purposes for which they may ordinarily and apparently be used in a customary way, the public should be excluded from their use, or appropriate notice of their unsuitable or unsafe condition should be given so as to warn persons of dangers in using them. If failure to perform these duties or any of them may be negligence that, if it proximately results in injury to another without his fault, will constitute a cause of action for compensatory damages." *Woodbury v. Tampa Water Works* (Fla.), 49 S. 556, 21 L.R.A.; 1034; *Turlington v. Tampa Electric Co.* (Fla.) 56 S. 696, 38 L.R.A. 72; *Peavey v. City of Miami*, (Fla.) 1 S. (2nd) 614, Neg. Comp. Cases, Vol. 12, New Series, p. 40. Insofar as adults are concerned it would seem that the maintenance of the guard chains across the openings in the fence is a sufficient use of proper care and caution in safeguarding such persons from entering upon the field.

We are, however, confronted with the question of whether or not the use of chains would be sufficient use of proper care and caution in safeguarding the field from children.

It seems to us that an airplane field might come under the doctrine of attractive nuisance. "* * * This doctrine imposes liabilities for injuries to children, even though they are technically trespassers, where such injuries are the result of the failure of the owner or person in charge to take proper precautions to prevent injuries to children by instrumentalities or conditions which he should, in the exercise of ordinary judgment and prudence, know would naturally attract them into unsuspected danger. * * *" 45 C.J. 758, par. 155.

"* * * Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed. Under such circumstances he would have good reason to expect the children, from their well known habits and nature, would be attracted to the dangerous thing, and its maintenance would amount to an implied invitation to them, so that they cannot be regarded as voluntary trespassers. * * *" *McDermott v. Burke*, 256 Ill. 401, p. 406. *City of Pekin v. McMahon*, 154 Ill. 141.

In view of this doctrine of the law and the holdings in the cases in this state it is our opinion that in the event a child were injured because of the inadequacy of the present chain gates, the city would be liable.

SEWER DAMAGE

(No. 11052—Chairman, Finance Committee—C. N.—April 22, 1948)

In the absence of negligence, the City of Chicago is not liable for damage caused by city sewers backing up.

Citations:

Case: 202 Ill. 545.

Other reference: 18 Op. Corp. Coun. 932.

8 McQuillin, Municipal Corp. 8287.

OPINION OF FOREGOING SYNOPSIS

The above claim has been submitted to us for an opinion as to the city's liability.

This is a claim for expenses incurred during the month of September, 1947, in rodding the sewer which was found to be necessary because the connections had been broken at the main supplying claimant's property.

Claimant explains that in the spring and during September of 1947, upon finding his basement flooded and the catch basin filled, he had the pipes rodded and his plumber determined that the pipe was broken about 7 or 8 feet beyond the curbstone. He then hired a contractor to repair the damage and the contractor found that the building fixtures were completely severed from the main. Claimant explains further that the Sewer Department and Water Department concurred in this finding and made the necessary repairs, which included arching the Water Department's pipe over the sewer pipe. At the time of making his claim all the work by the city had been completed except resurfacing.

The report of the Superintendent, North District, Water Pipe Extension Division, covering this incident, explains that there was no broken water main at this location, but that the flooding of the basement was caused by the sewer backing up because of the break at the main. It is explained that the water main was laid in 1911 and no work had been done at this location since that time. The Superintendent expresses surprise that the sewer had not backed up oftener in view of these circumstances. In corroboration of claimant's account, the Superintendent reports that on October 20, 1947 a departmental crew excavated and set 8 inch sleeve and 1 foot offsets to the north and south of sleeve to permit laying of the 6 inch house drain.

On June 14, 1932 we rendered for your committee, Opinion No. 7606 (a digest of which can be found at page 932, volume XVIII, Opinions of the Corporation Counsel and Assistants), in which we cited the case of the *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545 (1903) and fully discussed the circumstances relating to liability and nonliability on the city's part for damage to property due to broken water mains. In that opinion we quoted the following from McQuillin on Municipal Corporations, volume VIII, page 8287:

"In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system."

The facts in this case show commendable promptness on the part of the Water Pipe Extension Division upon receiving notice of the leak which caused the flooding of claimant's basement.

Since nothing in the record tends to show negligence on the city's part in its maintenance of water mains, we are of the opinion that the City of Chicago is not liable for the damage to claimant's property herein claimed.

AUTO LIABILITY

(No. 11083—City Engineer—S. A.—November 24, 1948.)

The State Automobile Driver's Liability Law does not exempt City owned vehicles and drivers of City owned vehicles from its requirements.

OPINION OF FOREGOING SYNOPSIS

Your October 18th letter addressed to the Honorable Benjamin S. Adamowski, Corporation Counsel, has been referred to this division for handling. We are hereby furnishing the information requested so that your employees can be advised regarding the effect upon them of the State Automobile Drivers Liability Law.

Inasmuch as you have submitted the request in the form of three separate questions we will answer them in their proper order:

1. The State Automobile Drivers Liability Law does not exempt City owned vehicles and drivers of City owned vehicles from its requirements.

2. City employees are not exempt from posting bonds and other requirements of this law, and in case of an accident are personally and jointly liable with the City for whatever damage results where liability can be established.

3. Where a judgment is entered against a driver of a City automobile he will be expected to pay that judgment. The City will not assume the obligation.

We trust that the above information will clarify your understanding of this law.

UNION LABEL

(No. 11086—Purchasing Agent—F. T. M.—December 2, 1948.)

An advertisement for bids for printing which requires the Union label is illegal.

Citations:

177 Ill. 194.
179 Ill. 318.
188 Ill. 206.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of November 29, 1948, which is as follows:

"The City of Chicago advertised for bids on Motor Vehicle Inspection Emblems for the Public Vehicle License Commission. The specifications submitted by the above department contained the following paragraph:

'Emblems shall be lithographed, printed or engraved. Each emblem shall bear the Union Label.'

"The lowest responsible bidder bid without the Union Label. It is our understanding that the requirement of the Union Label is illegal.

"Can the award be made to the lowest responsible bidder who did not bid on the Union Label requirement or must the award be made to the next lowest responsible bidder who bid on providing the Union Label, or in your opinion should the bids be rejected and readvertised and omit the requirement in the specification of Union Label?"

In the case of *Fiske v. The People*, 188 Ill. 206 (1900) the court passed upon the constitutionality of an ordinance of the City of Chicago requiring a bidder to agree to employ only members of labor unions on contracts for public improvements. The court said on page 208:

"Undoubtedly, the ordinance of October 17, 1898, is unconstitutional and void. The requirement, that the bidder for doing the work on a public improvement shall agree to hire only members of labor unions in the performance of such work, and that, in all contracts executed by the commissioner of public works on behalf of the city, the contractor shall agree to hire only members of labor unions, amounts to a discrimination between different classes of citizens, and lays down a rule, which restricts competition and increases the cost of work. Under our constitution and laws, any man has a right to employ a workman to perform labor for him whether such workman belongs to a labor union or not, and any workman has a right to contract for the performance of labor irrespective of the question whether he belongs to a labor union or not. Such ordinances and contracts as the ordinance of October 17, 1898, have been recently held to be unconstitutional and void in the cases of *Adams v. Brennan*, 177 Ill. 194, and *Holden v. City of Alton*, 179 id. 318. These cases are conclusive as to the invalidity of this ordinance."

The provision in the specification requiring each emblem to bear the union label is illegal, tending to create a monopoly, restraining competition and imposing an additional burden upon taxpayers who are entitled to have such contracts let to the lowest responsible bidder. It is our opinion that by reason of illegality of that provision all bids received should be rejected, and the proposal readvertised, omitting from the advertisement and specifications the requirement for union labels.

CHAPTER XII — CITY PROPERTY

A. REAL ESTATE

AIRPORT LEASES

(No. 11035—Commissioner of Public Works—A. J. R.—February 25, 1948.)

The granting of space to operate a business at the Northerly Island Airport involves leases of real estate rather than concessions and the City Comptroller is the proper person to act on behalf of the City in such cases under the provisions of the Municipal Code.

Citations:

265 Pac. 78 (Kan.).

154. Pac. 1014.

OPINION OF FOREGOING SYNOPSIS

By your letter of February 11, 1948, you have requested our opinion upon the method of handling the granting of certain privileges involving the use of space at the Northerly Island Airport. Your letter states that these privileges should be available to responsible applicants in open and competitive bidding. Your letter further states that it is contemplated "that the city will fix, in advance, the rental to be charged for space, and the applicants for it will bid a percentage of their gross receipts for the privilege of doing business in that space." The question which you present to us is whether such an arrangement is a concession or a lease of real property. If it is the former, the Purchasing Agent must be the contracting agent for the city and if it is the latter, the City Comptroller must act.

The term "concession" is used according to a variety of meanings. In the sense according to which we must here consider it, we believe it is validly distinguished from other arrangements by the decision of the Supreme Court of Kansas in *Warren et al. v. City of Topeka, et al.*, 265 Pac. 78.

The situation which was before the court in that case involved a grant by the City of Topeka to one Torsney of the exclusive privilege of operating city-owned facilities in a park. The instrument by which Torsney's rights were granted provided "that the commissioner of parks and public property of the city shall at all times have the general supervision of the parks and property, and that Torsney, in the operation of the concessions granted, shall at all times observe such rules and regulations as may be laid down from time to time by such commissioner."

In determining the character of the arrangement between Torsney and the city, the Supreme Court said (page 80):

"A careful examination of the agreement attached to the petition does not show it to be a lease from the city to defendant Torsney. It

can more properly be called a concession, with the city reserving to itself and the commissioner of parks and public property full and complete control and supervision over the entire park and the property therein and the right to impose from time to time rules and regulations as to the operation of the concessions granted. We think, as was said concerning an apparently similar agreement in the *Bailey* Case above cited, that—

"The concessions granted do not amount to the leasing of any part of the park * * * nor do they involve the loss of control over it by the public officers." Page 329 (154 P. 1014)."

We believe this decision points to a sound distinction between a lease of real estate and a concession. The vesting of possession, control and right of occupancy of premises for a stated purpose for a consideration known as rental is the essence of a lease. The right to carry on a business in the leased premises is the standard purpose of a business lease and does not make the lease a concession.

A concession, in our opinion, must be defined as a right to carry on a business in premises of which the possession, control and right of occupancy remain in the grantor of the privilege.

The payment of all or part of the rental of business premises by surrendering a percentage of the gross receipts of the business has become common. The percentage is a payment for the rights bestowed by the lease, a form of rental, and does not change the lease into a concession.

As we view the matter the important fact in the arrangements with which your letter deals is that the privilege of doing business is limited to the space covered by the lease and for which a rental is paid. If there were a grant of the privilege of doing business in space of which the city retained possession, control and right of occupancy, we should have to regard the arrangement as a concession.

For the reasons herein stated, we are of the opinion that the situations with which your letter deals involve leases of real estate rather than concessions and that with regard to them the Comptroller is the proper person to act on behalf of the city under the provisions of the Municipal Code.

SELLING A LEASEHOLD

(No. 11077—City Comptroller—F. S. L.—September 22, 1948.)

The City of Chicago may dispose of a leasehold interest by compliance with the pertinent provisions of the Cities and Villages Act of the State of Illinois.

Citations:

Statute:	IRS '47, Ch. 24, Sec. 59, pars. 1-2.
Cases:	302 Ill. 455, 458, 459.
	390 Ill. 619, 624, 626.

OPINION OF FOREGOING SYNOPSIS

In your letter you request advice as to whether the City of Chicago has a legal right to sell to persons interested in purchasing the same, its existing leasehold interest in the property commonly known as 23 North Wacker Drive, Chicago, Illinois.

Under the applicable laws (*Storke v. Penn. Mutual Life Insurance Co.*, 390 Ill. 619 at 624, 626) the condition in the assignment of the lease to the City of Chicago to the effect that the premises shall not be used for any purpose except hospital purposes without written consent of the hospital is without force for the reason that the assignment of the lease makes no provision for a right of re-entry and the hospital corporation has been dissolved by court order as of June 1, 1937.

It is our opinion that a leasehold estate carries with it a sufficient interest in the land to bring it within the real property classification. (*Chicago v. University of Chicago*, 302 Ill. 455 at 458, 459). Therefore, all the right, title and interest therein, if declared surplus, can be disposed of only by conforming to the provisions of the statutes hereinafter cited.

The City may dispose of its leasehold interest by compliance with paragraphs 1 and 2 of Section 59, Chapter 24, Illinois Revised Statutes. The sections provide in substance that the City may sell surplus property by an ordinance directing the sale passed by three-fourths of the aldermen. Notice of the intention to sell must be published at least twice in one or more newspapers published in the municipality, with publication not more than 30 days nor less than 15 days in advance of the opening of bids. Bids must be opened only at a regular meeting of the City Council and approved by a vote of three-fourths of all aldermen.

B. WATERWORKS.

See opinion: Supplying water to non-residents.

(No. 10847—Chairman, Finance Committee—M. H. F.—June 8, 1945.
Page 125-126.)

C. TAXATION OF CITY PROPERTY

SALES TAX APPLICABLE TO CITY PURCHASES

(No. 10734—Commissioner of Subways—B. O'H.—January 28, 1943.)

The B. F. Goodrich Company must pay the Illinois Retailers' Occupational Tax, where material is sold by them direct to the city to be installed by another contractor.

No citations.

OPINION OF FOREGOING SYNOPSIS

Replying to your letter of January 11 in which you make inquiry as to the Retailer's Occupation Tax Liability in connection with Order No. S-12 of Contract T-2 (C.J. p. 5620), it is our opinion that The B. F. Goodrich Company, the contractor, is liable for the payment of the tax. What the contractor is furnishing to the City is certain rubber material, fabricated in the form of pads, to be installed by another contractor under the tie plates of the subway tracks. The fact that the rubber pads are manufactured according to a special design furnished by the City and are usable only for the subway project does not constitute a guide for the determination of tax liability. The pads are sold outright to the City in a commercial retailing transaction and upon delivery to the City are subject to any use the City wishes to make of them. The circumstance that the City after their purchase intends to turn the pads over to another contractor who in turn employs them as part of the subway equipment does not change the Retailer's Occupation Tax Liability which would exist if the City put the pads to any other use. They are as much subject to the tax as would be a purchase of steel rails to be placed over the pads.

You inform us verbally that while the City in this instance has not by contract assumed the payment of the tax if any it is your understanding that if the tax does not have to be paid the City will receive a rebate on the bid price to the extent of the tax saved. However, as we have stated and for the reason given, it is our opinion that the tax must be paid.

CHAPTER XIII — CONTRACTS

A. BIDS AND AWARDS

BID BONDS

(No. 10939—Commissioner of Public Works—M. H. F.—February 5, 1947.)

A bid submitted to the City accompanied by bid bonds in lieu of cash or certified check is an informal bid and as such cannot be given consideration by the City.

Citation: Municipal Code, 26-15.

OPINION OF FOREGOING SYNOPSIS

Your communication of January 31, 1947 transmits copies of city's specifications No. 20-47, for white cotton rags, and 21-47, for No. 1 white cotton waste, and you state that on bids received for such supplies the Philip Carey Manufacturing company is the low bidder but that this company has submitted bid bonds in lieu of cash or certified checks in support of its bids. Our opinion is requested as to whether the bonds guaranteeing the bidders performance if awarded the contracts may be deemed acceptable to the city in lieu of cash or certified check deposits.

Inspection of the specifications shows that your instructions to bidders calls for the deposit of \$400.00 in one case and \$100.00 in the other.

Section 26-15 of the Municipal Code of Chicago provides as follows:

26-15. (Requisite of bids.) In all cases, the bids for doing any work or making any public improvement, or for furnishing any materials or supplies, shall be sealed bids, directed to the commissioner of public works, and shall be accompanied by a deposit, the amount of which shall be fixed by said commissioner and named in the advertisement, and shall not exceed five per cent of the estimated cost of improvement or work to be done or of the materials or supplies to be furnished, or be less than the sum of one hundred dollars.

Such deposit shall be in money, or a certified check upon some Chicago bank in good standing, payable to the order of the commissioner of public works, and shall be forfeited to the city in the event that the bidder shall neglect or refuse to enter into a contract and give bond, as hereinafter required, to execute the work or furnish the materials or supplies for the price mentioned in his bid and according to the plans and specifications, in case the contract shall be awarded to him. Such bids shall be opened at the hour and place mentioned in such notice.

Inasmuch as the above quoted section of the code specifically requires in all cases that bids for furnishing any materials or supplies shall be

accompanied by deposits, which deposits shall be in money, or certified checks upon some Chicago bank in good standing, our opinion is that you must regard the bids submitted by the Philip Carey Manufacturing Company as informal. To do otherwise would place you in the position of disregarding a plain provision of the Municipal Code obviously designed to protect the city against defaults and also to place all bidders upon an equal footing. A bond guaranteeing the bidders performance might require court action to enforce its terms, whereas the cash deposit or certified check might be immediately applied in reduction of the city's damages. Again, to accept a bond in lieu of the cash deposit or certified check would vary the terms of your advertisement and place one bidder in a more favorable position than other bidders.

COUNCIL APPROVAL OF CONTRACTS

(No. 10974—Chairman, Finance Committee—J. F. G.—June 23, 1947.)

Since the revision of the Municipal Code in 1939 every City contract involving an expenditure of more than \$500.00 must be specifically authorized by the City Council.

Citation: Municipal Code, 26-12.

OPINION OF FOREGOING SYNOPSIS

In response to your verbal request on the subject of approval of contracts by the City Council, Section 222 of the Revised Chicago Code of 1931 provided that all contracts involving an expense of more than \$500.00 shall be let to the lowest responsible bidder after advertising and shall be approved by the Mayor. It also provided that no contract relating to matters within the jurisdiction of the Department of Public Works shall be made without authority of the City Council.

Because the provision for council authority applied to all contracts, even for \$500.00 or less, I expressed an informal opinion that a proper appropriation was sufficient to authorize the Commissioner of Public Works to contract for any work or materials required, subject to the lowest bidder limitation when the amount involved exceeded \$500.00.

I have come to the conclusion after careful study that since the revision of the Code in 1939 every contract involving an expenditure of more than \$500.00 must be specifically authorized by the City Council. The last sentence in Section 26-12 of the Municipal Code of Chicago seems to make that clear. It provides:

"No contract involving an expenditure of more than five hundred dollars shall be made unless the same shall have been authorized by the city council."

SALES TAX CONTRACTS

(No. 11014—Purchasing Agent—A. J. R.—January 8, 1948.)

It is the duty of the Purchasing Agent to determine which bid is the lowest; therefore a proposed representation clause to be inserted in proposal forms wherein the bidder represents he is or is not subject to the Illinois Retailer's Occupational Tax, would not be valid as it would be then placing the partial determination of the lowest bid in the bidder himself.

Citation: IRS '47, Ch. 24, Par. 22A-16.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your request for our opinion upon the form and legality of certain representatives intended for inclusion in proposal forms to be used in connection with invitations to bid for city contracts and purchases. The form of the representations as set out in your letter is as follows:

"The undersigned certifies that he (is or is not) subject to and required to pay the Illinois Retailers' Occupation Tax in connection with the contract hereunder. (If subject to the Illinois Retailers' Occupation Tax). The total dollar value of the total amount or amounts bid subject to the Illinois Retailers' Occupation Tax is \$_____".

Section 16 of "The Municipal Purchasing Act for cities in excess of 500,000 population", approved July 21, 1947 (Smith-Hurd Ill. Rev. Stats. 1947, chap. 24, par. 22A-16) provides that:

"For the purpose of determining the lowest bidder under the provisions of this article, an amount equal to the tax which a bidder not subject to the 'Retailers' Occupation Tax Act', approved June 28, 1933, as amended, would be required to pay on the gross receipts of his bid, pursuant to that act, if he were subject to that act, shall be added to his bid."

It is the duty of the purchasing agent to determine which bid is the lowest. The quoted provision of the statute requires a certain computation as a part of that determination. That computation depends upon the ascertainment of facts from which it must follow as a matter of law whether a bidder is or is not subject to the Retailers' Occupation Tax Act. In our opinion the ascertainment of these facts and the making of the computation are the function and obligation of the purchasing agent to no less an extent than is the determination of which bid is the lowest.

That being the case, we do not believe that the purchasing agent is entitled to rely upon the bidder's representation as to whether he is or is not subject to the tax. And if the bidder is subject to the tax we do not believe the purchasing agent can properly rely upon the bidder's representation as to the amount of the tax. To do so would seem to amount to letting the bidder participate in determining whether his bid is or is not the lowest.

In our opinion, the suggested certificate should not be used in any form.

B. EXECUTION AND INTERPRETATION

3% ILLINOIS USE TAX APPLIES TO CITY CONTRACT

(No. 10763—City Comptroller—M. H. F.—January 13, 1944.)

In a contract wherein the City agrees to purchase fire hose from a New York corporation to be delivered F. O. B. Chicago, the 3% Illinois Use Tax is applicable. Title passed in Chicago and City agreed to pay the lineal foot price plus 3% tax.

Citation: 338 Ill. 136.
 363 Ill. 354.
 383 Ill. 316.

OPINION OF FOREGOING SYNOPSIS

Your communication of January 12, 1944 forwards (1) original contract No. 12577 dated May 2, 1940 between American-LaFrance-Foamite Corporation and the City of Chicago, with instruction to bidders, proposal, and specifications attached, and (2) your file composed of voucher estimate and final No. 10790 in the sum of \$12,211.52 and other related documents. The documents show that the city has paid the contractor the sum of \$12,211.52 for the supplies contracted for under the contract and that the seller is now asking the city to pay a further amount of \$366.35, representing 3% Illinois Retailers' Occupation Tax. Our advice is sought as to whether the city should pay this further amount of \$366.35.

From an inspection of the documents it appears the contractor is a New York corporation maintaining a Chicago office. By the contract it agreed to furnish and deliver to the city, f.o.b. Chicago, Illinois, 20,000 feet of fire hose, for which the city on its part agreed to pay the following prices:

"Thirty-five and Eight-tenths Cents (\$0.358) per foot, plus 3% Illinois Use Tax if Applicable, for said 1½-inch Double Jacketed Cotton Rubber Lined Fire Hose, complete with 1½-inch Slidewell Couplings, attached and threaded "Chicago Standard", as specified.

"Seventy-eight Cents (\$0.78) per foot, plus 3% Illinois Use Tax if Applicable for said 3-inch Double Jacketed Cotton Rubber Lined Fire Hose, complete with 2½-inch Slidewell couplings, attached and threaded "Chicago Standard", as specified.

"The above prices include all State and/or Federal direct and/or indirect taxes which apply to this contract."

The proposal, which is attached and made a part of contract, is dated April 5, 1940. It offers to supply the fire hose and employes the same language in expressing the prices as that contained in the contract, namely, "\$0.358 per foot, plus 3% Illinois Use Tax if Applicable," for 1½-inch hose and "\$0.78 per foot, plus 3% Illinois Use Tax if Applicable," for the 3-inch fire hose.

In billing the city the contractor has added to its invoice the amount of the tax explaining the same by rubber stamp imprint reading as follows:

"Illinois tax.

"Tax constitutes part of price and is separately shown for seller's convenience."

The contract was entered into at a time when the rate of tax imposed by the Illinois Retailers' Occupation Tax Act was 3%. We understand that this 3% rate prevailed until June 30, 1941, after which it was reduced to 2%. As the contract was entered into and shipments were made under it in the year 1940 the 3% rate would therefore apply if the contractor corporation was subject to the tax.

While the clause "plus 3% Illinois Use Tax if Applicable" is somewhat ambiguous in that it is pertinent to a use or sales tax which may be passed on to the consumer, rather than descriptive of the Illinois Retailers' Occupation Tax which is imposed upon the dealer for the privilege of engaging in the business of selling tangible personal property at retail in this State, it seems to be fairly deducible from the language used and the specific reference to a "3%" Illinois tax that the contractor corporation submitted its bid at the lineal foot price plus 3% Illinois Retailers' Occupational tax, if such tax was applicable. The words "if applicable", as we interpret them, mean if the Illinois Retailers' Occupation Tax is applicable to the contractor corporation and the transaction involved.

Effective July 1, 1943, the following provision became a part of the Illinois Retailers' Occupation Tax Act:

"Sec. 1b. For the purpose of this Act, a 'person' is 'engaged in the business of selling tangible personal property at retail in this State' whenever such 'person', either himself, or through an employee or employees located in this State or coming into this State for the purpose, or through an agent or agents located in this State or coming into this State for the purpose, or through a representative or representatives located in this State or coming into this State for the purpose, or through an independent person or persons located in this State or coming into this State for the purpose and acting for such 'person' (the seller) under a contract of agency, engages habitually, for livelihood or gain, in selling activity in this State, the primary purpose of which selling activity in this State is to promote the 'sale at retail' of tangible personal property by such 'person,' as the phrase 'sale at retail' is defined in this Act. If a 'person,' or someone authorized to act on his behalf, engages habitually, for livelihood or gain, in selling activity in this State, the primary purpose of which selling activity is to promote the 'sale at retail' of tangible personal property by such 'person', such 'person' is 'engaged in the business of selling tangible personal property at retail in this State,' notwithstanding the fact that orders for tangible personal property or offers to purchase tangible personal property resulting from such selling activity in this State are not accepted in this State by such 'person' or by someone authorized to act on his behalf for this purpose, and notwithstanding the fact that the tangible personal property which is sold as the result of such selling activity in this State is not, at the time of its sale, located in this State, and notwithstanding the fact that the ownership of, or title to, such tangible personal property is not transferred in this State to the purchaser."

On September 15, 1943 the Illinois Supreme Court denied rehearings in the case of *Ex-Cel-O Corporation v. McKibbin, Director of Finance*, 383 Ill.

316, and other related cases. As interpreted by the State Department of Revenue, the effect of these decisions is that, prior to July 1, 1943, the retailers' occupation tax liability was not incurred by out-of-state vendors in cases where their sales of tangible personal property to purchasers in Illinois for use or consumption were made under circumstances where orders were solicited in Illinois, provided that such orders were subject to acceptance or rejection outside Illinois by such vendors, and provided that the property which was sold was located outside Illinois at the time of its sale, and provided, in addition, that the ownership of, or title to, such property was transferred outside Illinois to the purchasers. In other words, if, in a particular sale, all the major elements of selling activity, except the solicitation of orders, occurred outside Illinois, the vendor, prior to July 1, 1943, was not subject to the tax measured by his gross receipts from that sale. In the instant matter it seems apparent that the order for the fire hose in question was solicited in the State of Illinois by an agent of the contractor corporation from its local Chicago office, but that such order was subject to acceptance or rejection outside Illinois, and that the property sold was located outside Illinois at the time of its sale. This is indicated by the contractor corporation's proposal which was submitted April 5, 1940 from its Elmira, New York office, signed by H. M. Keyser, Assistant Secretary, and by the bills of lading showing shipments of the hose from a place outside Illinois.

However, by Bulletin No. 9 released September 15, 1943 by the Department of Revenue of the State of Illinois as a supplement to that department's rules and regulations relating to the Retailers' Occupation Tax Act, the department holds that tax liability was incurred during the period of time prior to July 1, 1941, where orders resulting in retail sales of tangible personal property to Illinois purchasers were solicited and accepted in this State by the seller or by his representatives, and where, in addition, the ownership, or title to, the property which was sold was transferred in this State to the purchaser, as in the case of an f.o.b. destination shipment into Illinois, and that the place at which such property was located prior to its sale is not material.

In the instant case, while the order was doubtless accepted outside Illinois by the contractor corporation, and the fire hose which was sold was located outside Illinois at the time of its sale, the ownership of, or title to, such fire hose was not transferred outside Illinois to the city, but was transferred in Illinois. This is evidenced by the f.o.b. destination shipment into Illinois.

Of course the rules of the Department of Revenue can neither limit nor extend the scope of the statute. If there was a tax liability for sales made in 1940, then the authority for imposing it must be found in the law then in force. The 1943 amendment to section 1b of the act, if it has any effect, tends to show that those made subject to the tax by the amendment were not subject prior to the amendment.

The Supreme Court has definitely held that the act does not authorize the imposition of a tax upon the occupation of soliciting orders where that is the only business which is actually engaged in within the State, the sales being consummated in another State where title, ownership and possession of the goods passes to the buyer. *Allis-Chalmers Co. v. Wright*, 363 Ill. 354; *Ayrshire v. Nudelman*, 383 Ill. 345; *Ex-Cell-O Corporation v. McKibbin*, 383 Ill. 316. In *Standard Oil Company v. Department of Finance*, 338 Ill. 136, the court considered sales of petroleum products made on orders or contracts placed with, and accepted by the Standard Oil Company at its offices located within Illinois, the products sold however being outside the State when the sale was made and being sold f.o.b. an out-of-state refinery. The sales were made in 1940, under the act as amended in 1939. The court excluded such sales which were not consummated by delivery or the passing of title in this State and held that

such business did not constitute engaging in the business of selling tangible personal property at retail in this State.

So far as we know the precise question presented by your inquiry has not been passed upon by the Supreme Court, though it appears to have been decided by the Department of Revenue when it promulgated Bulletin No. 9 above referred to. When the court has decided that the mere domestication of a corporation under the Illinois laws for the purpose of enabling the corporation to transact business within this State, and the mere solicitation of orders within this State, do not constitute engaging in the business of selling tangible personal property at retail in this State, it seems difficult to reach the conclusion that the mere consignment of property f.o.b. some point in Illinois, should constitute engaging in business in this State. If the mere sale of property located without the State, and shipped f.o.b. some point within the State, constituted engaging in business within this State, then every non-State concern selling tangible personal property at retail f.o.b. some point in Illinois, would be doing business in Illinois and subject to the tax. This is an inconceivable situation. However, we are not prepared to say that the determination reached by the Department of Finance is incorrect, and that the Supreme Court would not hold in the instant matter, where the selling corporation was licensed to transact business in Illinois, maintained a local office in Chicago with a resident agent in charge who solicited the order, and where the property was shipped from a point outside the State f.o.b. Chicago, that these combined factors would not constitute engaging in business in this State and subject the corporation to the payment of the tax.

While the matter is not free from doubt, our best advice to you under the facts and circumstances of this particular case is that you accept the determination of the Department of Revenue.

The 3% tax being applicable the next question is whether the city is obligated to pay it. In opinions given the City Comptroller December 16, 1943 and December 27, 1943 we observed that the Illinois Retailers' Occupation Tax Act contained no prohibition against the purchaser agreeing to pay the tax, and in a case where the city had agreed in a supply contract to pay a fixed price "plus 2% on account Retailers' Occupational Tax," the city was obligated to pay not merely the fixed price but also the 2% tax. Being constrained to follow the view therein expressed in these former opinions, our opinion in the instant matter therefore is that by agreeing to pay the lineal foot prices for the fire hose, plus the 3% Illinois Tax, the city is obligated to pay the amount of \$366.35 in question.

SALES TAX ON CITY PURCHASES

(No. 10780—Commissioner of Public Works—M. H. F.—April 21, 1944.)

The Illinois Retailers' Occupational Tax applies to City purchases where title to the property passes in Illinois.

Citations:

Cases: 338 Ill. 136.

Other references: Op. Corp. Coun. No. 10763, p. 549, this volume.
Department of Revenue;
Bulletin 9, September 15, 1943.
Bulletin 10, April 1, 1944.

OPINION OF FOREGOING SYNOPSIS

Your communication of April 18, 1944 asks our advice with reference to the payment by the city of the 3% Illinois Retailers Occupational Tax on certain supply contracts made in the year 1940 with the Alabama Pipe Company, the Lynchburg Foundry Company and the United States Pipe and Foundry Company, respectively, under which contracts sums of money equal to the amount of such tax are now being withheld by the city. The question presented for determination is whether the tax is applicable to the contracts.

With reference to the contracts made with the United States Pipe and Foundry Company you inform us that that company has been advised by its attorneys that the sales made under its contracts are not subject to the tax and that it will be satisfactory to it that the city retain the monies now being withheld and close its files inasmuch as the tax does not apply to such contracts. This indicates to us that this company has not paid the tax to the State of Illinois and is not looking to the City of Chicago for reimbursement. So, it is believed that you should take the company's word for it and not volunteer payment.

Concerning the contracts made with Alabama Pipe Company and the Lynchburg Foundry Company you state that these companies are foreign corporations and that the Alabama Company only is licensed to transact business in the State of Illinois; that both companies maintain Chicago offices in their own names and that the materials delivered under their contracts originated outside the State of Illinois and were delivered, freight prepaid, to the city. As your letter does not state whether the sales were made f.o.b. Chicago, we have telephoned Mr. Martini, Engineer of Contracts, and learned from him that all sales were made f.o.b. Chicago. Such being the case, we assume that the ownership or title to the materials sold was transferred to the city in Illinois. You further inform us that the contracts made with these two companies provided that the 3% tax was included in the sales price and that the contractor corporations therein agreed to refund to the city the tax in the event it was not applicable to the contracts. It is also said that the Alabama Company is demanding the amounts withheld under its contracts and contending that under the decision of the Supreme Court of Illinois in *Standard Oil Company v. Department of Finance*, (1943), 338 Ill. 136, and other related cases, that its previous payment of tax to the State of Illinois was proper, and that the city should now release the monies being held inasmuch as the contracts included the tax within the contract prices and obligated the city to pay it.

So far as the question presented by the Alabama Company's claim is concerned it narrows down to that answered in our opinion given the City Comptroller, January 13, 1944, a copy of which is enclosed herewith. We stated in that opinion that the State Department of Revenue had interpreted the above mentioned decisions of the Supreme Court of Illinois to mean that the retailers occupation tax liability was not incurred by out-of-State vendors in cases where their sales of tangible personal property to purchasers in Illinois for use or consumption were made under circumstances where orders were solicited in Illinois, provided that such orders were subject to acceptance or rejection outside Illinois at the time of its sale, and provided, in addition, that the ownership of, or title to, such property was transferred outside Illinois to the purchasers. Were it not for the fact that one of the factors above mentioned, namely, that of the transfer of title outside of Illinois, is missing, our opinion would be that the tax was not applicable to the transactions with the Alabama Company.

By Bulletin No. 9, released September 15, 1943 by the Department of Revenue of the State of Illinois, that department holds that tax liability

was incurred during the period of time prior to July 1, 1941, where orders resulting in retail sales of tangible property to Illinois purchasers were solicited and accepted in this State by the seller or his representative, and where, in addition, the ownership, or title to, the property sold was transferred in this State to the purchaser, as in the case of an f.o.b. destination shipment into Illinois, and that the place at which such property was located prior to its sale was not material. A later bulletin, Bulletin No. 10, released April 1, 1944, contains a ruling to the same effect.

While for the reasons expressed in our opinion to the City Comptroller the matter is not free from doubt, until the precise question is decided by the courts, our best advice to you is that you accept the determination of the Department of Revenue. When this determination is accepted it would, in our opinion, be proper to release to the Alabama Company the monies withheld under that company's contracts.

The conclusion herein reached with reference to the monies withheld under the Alabama Pipe Company's contract will equally apply to the monies being withheld under the contracts with the Lynchburg Foundry Company, if and when that company pays the tax to the State of Illinois and then demands that the city release to it the monies now withheld.

CITY LEASED BUILDING

(No. 10858—City Comptroller—A. E. P.—September 6, 1945.)

The owner of a building leased to the City, in accepting rent after the expiration of the lease created a month to month tenancy. Under a month to month tenancy the City may be evicted after being served with a thirty days' notice to vacate.

No Citations.

OPINION OF FOREGOING SYNOPSIS

We have your letter of August 30, 1945 in which you state that Salvatore, Anna and Rose Granata, leased to the City of Chicago a certain store for the use of the Department of Health. The lease was for a term of one year expiring July 31, 1944, and the city was unable to get the lessors to sign a renewal lease to July 31, 1945. Renewal lease from August 1, 1945 to July 31, 1946 was also sent to the lessors for their signature and has not been returned. You request that we advise you of the legal status of the city's occupancy.

The general rule of law is that when the tenancy is for a certain period and the expiration date is set out in the lease, no notice to vacate or surrender possession of the premises is necessary. If, however, the tenant holds over without a renewal lease and the landlord accepts the regular monthly payments of rent without indicating an intention to exercise his right to possession, the lease is automatically extended for another year.

In the present situation the lessors' refusal to execute a renewal lease sent to them before the expiration of the first lease clearly indicated that they did not intend to renew the original lease. One of the lessors informed Mr. Hoff, a representative of the city in its real estate department

that the lessors wanted the use of the premises for their own private purpose and gave the city until September 30, 1945 in which to vacate the property.

The landlord in accepting the rent each month from the city during the period between the expiration of the lease July 31, 1944 to the present time, created a tenancy from month to month.

In this situation the status of the occupancy of the city is that of a tenant from month to month and it may be proceeded against or evicted after being served with a thirty days' notice to vacate.

CITY CONTRACTS

(No. 10868—Chairman, Finance Committee—A. F. G.—November 23, 1945.)

The City is under no legal obligation to increase contract prices where Union wage scales have increased, in the absence of any provision in the contract to the contrary.

Citation: 10 Op. Corp. Coun. 770.

OPINION OF FOREGOING SYNOPSIS

Your letter of October 26, 1945, reads as follows:

"The Committee on Finance has had communications from several contractors, doing business with the City of Chicago, who claim that, since entering into contract with the City, wage scales have been greatly increased, in some instances to the extent that failure in business will result for some of these contractors if they are not given relief.

Will you please inform this Committee as to whether the City can increase the contractual obligations which now exist to the extent of the increased union wage scales'.

Unless the contracts with these contractors contain a provision increasing the contract price in such an emergency, the city is under no legal or moral obligation to pay more than the contract calls for. Otherwise any increase in the cost of material or labor could be passed on to the city.

This office held similarly in a case where the increase in the cost of carrying out the contract was caused by an order of United States Railroad Administration increasing freight rates. Nothing in the Railroad Administration Act provided that changes in freight rates would operate so as to alter existing contracts between parties who ship and parties who receive such freight. Nor was there any other general statute of the United States which had the effect of altering such contracts on account of increased or reduced freight rates. In passing on this matter we said:

"Such being the case, the change in the freight rate is no different than the change in price of labor or any other element that

enters into the cost of the commodity. The contractor is bound by his contract regardless of fluctuations in price which may affect his profits. This rule holds good even where a law passed subsequent to the making of a contract makes performance more burdensome. (9 Cyc. 631).

We are of the opinion, therefore, that unless there is a provision in the contract which contemplates a change in the contract price where the freight rate is changed, no extra compensation can be allowed on account of the order in question." (Opinions of the Corporation Counsel, Vol. X, p. 770.)

We are of the opinion, therefore, that what was said in the foregoing opinion applies equally to the case referred to in your letter.

BRIDGES IN CITY ON STATE HIGHWAYS

(No. 10880—Commissioner, Public Works—B. O'H.—December 19, 1945.)

The State Department of Public Works and Buildings may properly increase the allowance for maintenance of bridges and viaducts on state highways within the city. Such action must result from negotiations initiated by the City.

Citations:

Statute: IRS '45, ch. 120, par. 427, ch. 121, par. 37.

Other reference: 18 Op. Corp. Coun. p. 658.

OPINION OF FOREGOING SYNOPSIS

In your letter of November 26, 1945 you inform us that Alderman Kells, Chairman of the Subcommittee on the Motor Fuel Tax Activities, requested you to ascertain

- (1) whether the motor fuel tax law provides for payment from the State's share of the motor fuel tax funds for all or part of the maintenance costs of the bridges and viaducts located on state highways in the City of Chicago,
- (2) whether such payment if required is optional with or mandatory on the State of Illinois and
- (3) whether the State can be compelled to maintain these bridges and viaducts itself?

You inform us that at the present time the State of Illinois pays to the City of Chicago annually under a contract the total sum of \$3,750.79 for maintenance of pavement and snow removal of the twelve bridges located on state marked routes, that this amount is inadequate for the over-all maintenance and that therefore you are requesting the State to extend this procedure to include all maintenance costs of structures on state marked routes, which is estimated at \$79,060.00 for the year 1946.

You request us to render an opinion concerning the City's position with reference to the above.

The motor fuel tax law does not increase or decrease the powers and responsibilities of the State Department of Public Works and Buildings. It merely establishes a tax, sets up the procedure for its administration, and provides for the use which shall be made of the proceeds of the tax. A portion of the tax goes to the State Department of Public Works and Buildings by which it shall be used for certain specified purposes. The provision of the motor fuel tax law governing the use by the Department of Public Works and Buildings of its portion of the fund reads as follows:

"The amounts apportioned to the Department of Public Works and Buildings shall be used for:

The construction, reconstruction and maintenance of State bond issue roads, Federal aid roads, including such work within municipalities authorized by Acts of Congress and of this State relating to such roads, Federal Secondary roads, or State highway-belt line roads or the maintenance of said highways in municipalities or for the purchase of land and erection of buildings for highway purposes or for the purchase of right of way, or the separation of the grades of said State highways with railroads and with highways or where necessary in the judgment of the Department of Public Works and Buildings to provide adequately for traffic needs, the widening and improving of said State highways, or for any purpose relating or incident to and connected with the construction, reconstruction or maintenance of said roads, or for making of surveys, plans, specifications and estimates for and in the construction and maintenance of flight strips and of roads and bridges necessary to provide access to military and naval reservations, to defense industries and defense-industries sites, and to the sources of raw materials and for replacing existing highways and highway connections shut off from general public use at military and naval reservations and defense-industry sites, or for the purpose of right of way, except that the State shall be reimbursed in full for any expense incurred in building the flight strips." (Chapter 120, Par. 427, Ill. Rev. Stat., 1945.)

While it is mandatory upon the Department of Public Works and Buildings to use its portion of the fund for the purposes set forth in paragraph 427, and the Department is limited in the expenditure of its portion to the uses recited, there is nothing in the Act which attempts to govern or guide the judgment of the department in distributing the portion of the fund available to it among the various highways and projects under its jurisdiction.

In answer to the questions (1) and (2) raised in your letter, our opinion therefore is that under the motor fuel tax law the payment from the State's share of the motor fuel tax fund of all or part of the maintenance cost of the bridges and viaducts located on state highways in the City of Chicago is not mandatory. What amount, if any, from its share of the motor fuel tax fund is to be used in the maintenance of such bridges and viaducts rests in the discretion of the State Department of Public Works and Buildings.

At the present time the repair and maintenance of state-marked highways in the city of Chicago is being done by the City under an agreement with the State Department of Public Works and Buildings, by which agreement the City undertook to maintain the state-marked highways located within the city of Chicago under the supervision of the Department of Public Works and Buildings and at an expense to the State not to exceed a certain specified sum, this sum to cover repairs, snow removal, street cleaning and all other maintenance expense. The items totaling \$3,750.79

for maintenance of pavement and snow removal on bridges are included in this contract with the State.

This contract runs until June 30, 1946, unless sooner terminated on thirty days' notice by the State Department of Public Works and Buildings. Until the termination of the contract the City is bound by its terms and regardless of what the actual cost to the City may be for the maintenance of bridges and viaducts in question, the State under its agreement with the City is obligated to reimburse the City only to the extent stated in the contract.

It is our opinion that the State Department of Public Works and Buildings properly may increase the allowance for maintenance of bridges and viaducts in question more fairly to meet the actual expense of maintenance incurred by the City, and that moneys for such purpose may properly be paid by the Department from its portion of the motor fuel tax fund, but such action must result from negotiations initiated by the City and addressed to the discretion and sense of fairness of the State Department.

The agreement by the City with the Department of Public Works and Buildings was entered into under the authority of paragraph 37 of chapter 121, Illinois Revised Statutes, which provides:

"The Department is authorized, when it appears to be expedient, to enter into contracts with any municipal corporation terminable in the discretion of the Department for the municipal corporation to maintain the improvement or portion under the control of the State, located within such municipal corporation, or any part thereof, such maintenance to be under the supervision of the Department and at the expense of the State."

The purpose of this provision of the statutes, as pointed out in our opinion of August 3, 1932, (No. 7690. Opinions Corp. Counsel, Vol. XVIII, p. 658) was evidently to enable cities to maintain jurisdiction over their streets even where they had been improved in part with state funds. The first legislation providing for the establishment of a state highway system did not afford the State any jurisdiction over the extension of highways passing through cities and villages. As the state highway system grew with the development of automobile traffic, the advisability and the necessity of State aid, and to an extent of State supervision of state highways running through or terminating in the municipalities became so apparent that the Legislature in 1931 provided for such. To meet the objection of some municipalities that by conferring upon the State jurisdiction over the highways within a municipality some impairment of the benefits of local government might ensue, section 8c of the Highway Act, Smith Hurd's Stat. Chapter 121, was added. This is now part of paragraph 37, chapter 121, Illinois Revised Statutes, under which authority the City entered into the agreement with the State expiring June 30, 1946.

Whether the entire expense of maintenance of bridges and viaducts should be left to the State involves a question of policy to be determined by the city council prior to the expiration of the present contract with the State on June 30, 1946. In the determination of such question of policy the city council doubtless will give such consideration as it thinks proper to the fact that the maintenance of the highways by the State, even though the City were without any jurisdiction or supervision over any portion of the work of maintenance, would not absolve the City from responsibility for any damage which might result from defects in said highways.

It is our opinion, therefore, that the maintenance of bridges and viaducts located on state highways in the city of Chicago should be continued as at present until the expiration of the present contract with the

State Department on June 30, 1946, unless through negotiations the State Department, responsive to the equities, should agree to enter into a new arrangement which would seem more fairly to meet the situation. The present contract expiring on June 30, 1946, ample time remains for the determination by the city council of questions of policy involved and for negotiations with the State Department over the terms of a new agreement supplanting the agreement expiring June 30, 1946 if it should be the desire of the city council to continue after that time the present arrangement.

F. E. P. PROVISION IN CITY CONTRACT

(No. 10887—City Clerk—A. F. G.—February 11, 1946.)

The City Clerk, in making contracts, should observe the provisions of the City's Fair Employment Practice Act by inserting a provision in all such contracts substantially providing that the contractor in performing work under the contract shall not discriminate against any worker because of race, creed, color, or national origin.

Citation: Aug. 21, 1945, Coun. J. 3877, sec. 3.

OPINION OF FOREGOING SYNOPSIS

We have your letter of February 7, 1946 in which you ask to be advised "whether it is necessary for me to observe the provisions of Section 3 of the City's Fair Employment Practices Ordinance passed August 21, 1945 (C. J. page 3877) when drawing up contracts for printing and for the furnishing of license plates and tags, sticker license emblems, and other license supplies".

Section 3 of the said ordinance is as follows:

"All contracting agencies of the City of Chicago, or any department thereof, shall include in all contracts hereafter negotiated or renegotiated by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, creed, color or national origin and shall require him to include a similar provision in all sub-contracts."

We are of the opinion that you should observe the foregoing provision in any contract you are authorized by law to make and suggest the provision be in substantially the following form:

"Non-Discrimination in Employment. The Contractor, in performing the work required by this contract, shall not discriminate against any worker because of race, creed, color or national origin. The Contractor further agrees that each subcontract made under this contract will contain a similar provision with respect to non-discrimination."

This is the form used by the United States Government in its contracts, for the purpose of preventing discrimination.

M. T. S. LEASES

(No. 10916—*Superintendent, Municipal Tuberculosis Sanitarium—E. R. H.—October 11, 1946.*)

By statute the Directors of the Municipal Tuberculosis Sanitarium are given power to enter into leases in specified situations. Such leases must have the approval of the City Council.

Citation:

Statute: IRS '45, Ch. 24, Art. 72-6.

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of October 9, attaching a copy of a letter from Harold H. Egan to the Directors of the Sanitarium with reference to proposed lease to the property at 25-27 North Wacker Drive, Chicago, and asking our opinion as to whether or not the Directors of the Sanitarium may enter into a lease as outlined in Mr. Egan's letter;

Article 72 of the Cities and Villages Act, Illinois Revised Statutes of 1945 provides in part as follows:

"(Chapter 24, Page 518), 72-6 § 72-6. Organization—Powers and duties of directors—Appointees under civil service.) Immediately after their appointment the directors shall meet and organize by the election of one of their number as president and one as secretary and by the election of such other officers as they may deem necessary. They shall adopt such by-laws, rules and regulations for their own guidance and for the government of the sanitarium and the branches, dispensaries, and auxiliary institutions and activities connected therewith as may be expedient, not inconsistent with this article and the ordinances of the city or village.

They have the exclusive control of the expenditure of all money collected to the credit of the 'Tuberculosis Sanitarium Fund.' All money received for the sanitarium shall be deposited in the municipal treasury to the credit of the 'Tuberculosis Sanitarium Fund,' and shall not be used for any other purpose. It shall be drawn upon by the proper municipal officer upon the properly authenticated vouchers of the sanitarium board.

The board has the power to purchase or lease ground within or without the corporate limits of the city or village, and to purchase, lease, or erect appropriate buildings for the use of the sanitarium, branches, dispensaries, and other auxiliary institutions and activities connected therewith with the approval of the corporate authorities. It has the exclusive control of the construction of any sanitarium building or other buildings appropriate for its branches, dispensaries, and other auxiliary institutions and activities in connection with the institution, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased, or purchased for that purpose. The board has the power to appoint suitable superintendents or matrons or both and all necessary assistants and other employees, to fix their compensation, and to remove such appointees. The board in general shall carry out the spirit and intent of this article in establishing and maintaining a public sanitarium. At least one of the directors shall visit and examine the sanitarium at least twice each month and make monthly reports of its condition to the corporate authorities."

The above statute gives the directors power to enter into such lease but inasmuch as the statute provides that such a lease must have the approval of the corporate authorities, the approval and consent of the City Council of the City of Chicago to such lease would be necessary.

PLAYGROUNDS

(No. 10918—Chairman, Finance Committee—J. F. G.—October 21, 1946.)

The bond fund, representing a capital account for constructing and equipping playgrounds and acquiring the land therefor, is not available for the purpose of grading or leveling lots for playground purposes without assurance that the property can be used as a playground for a sufficient length of time to warrant the expenditure. A mere license to use the property subject to termination at any time is insufficient to warrant the expenditure of capital funds.

Citation:

Reference: Coun. J. pp. 6020-21, July 11, 1946.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 4, 1946 making reference to the order of the City Council passed July 11, 1946 (Coun. J. pp. 6020-21) authorizing the Commissioner of Public Works to lease at rentals of \$1 per year various parcels of privately-owned property as selected by the alderman of the ward and to grade, improve and equip such leased property as play fields or play lots at total costs not to exceed \$1,000 for play lots or play fields in each ward, to be paid from the playground bond fund.

The order was passed by the City Council upon recommendation of your committee after it had received an opinion from this office dated June 26, 1946 upon your request as to the legality of expenditures from the playground bond fund for equipment, development and construction of playgrounds on unleased Board of Education property and property of other governmental units. In that opinion we held that an appropriation from the bond fund for the purpose indicated is consistent with the purposes expressed in the ordinance authorizing the issuance of playground bonds, provided that the Board of Education and other governmental units enter into agreements with the City of Chicago leasing, or otherwise granting to the City, the use of land for the playgrounds for a term reasonably commensurate with the normal life of the improvements and equipment to be constructed and installed by the City.

All that we said in that opinion is applicable to playgrounds and play fields on property owned by private persons, as well as on property owned by some governmental unit.

At a meeting of a subcommittee of the Committee on Finance to consider what, if anything, was holding up compliance with the order of the City Council of July 11, 1946 it was disclosed that the aldermen interested had in mind the expenditure of small amounts of money for each play

lot for grading the lots so that they could be used for off-street play fields by children in the neighborhood, and that most of the property to be used would be tax delinquent and no leases could be secured for any definite time to comply with the requirements of our opinion of June 26, 1946.

Under the circumstances, it is our opinion that the bond fund, which represents a capital account for constructing, equipping and improving playgrounds and acquiring land necessary therefor, is not available for the purpose of grading or leveling lots for playground purposes without assurance that the property can be used for the purposes intended for at least a sufficient tenure to warrant the expenditure. A mere license to use the property improved for playground purposes, subject to termination at any time, is insufficient to warrant the expenditure of capital funds.

AIRPORT AGREEMENT

(No. 11075—*Commissioner of Public Works—J. F. G.—September 14, 1948.*)

There is nothing in the Airport Agreement of 1942 between the City of Chicago and the airlines operating at the Municipal Airport which compels the City to lease to an airline freight terminal facilities or to consent to any sublease or assignment of a lease on property leased exclusively to any of the scheduled airline operators.

Citations:

- Cases: 10 Fed. 210, 213.
 290 Ill. 360.
 292 Ill. 190.
 292 Ill. 236, 253.

- Other reference: McQuillin on Municipal Corporations, (Revised) Sec. 1743, note 51.
 Pond, Law of Utilities, 4th ed., Sec. 280.
 43 Am. Jur. 638.
 Dillon Sec. 27.

OPINION OF FOREGOING SYNOPSIS

Replying to your letter of September 1, 1948, in reference to previous request for legal advice in regard to airport fees at Chicago Municipal Airport for handling freight by scheduled airline operators, it appears that you are concerned with the question whether the 1942 airport agreement with each of said air carriers granted to them the right to use the airport facilities for handling freight and express shipments through the airport.

On May 23, 1946 we had occasion to consider this subject by letter addressed to the Honorable James B. Bowler, Chairman of the Committee on Finance, copy of which was forwarded to you. In that letter we said in part:

"In answer to your letter of May 14, 1946, you are respectfully advised that the Airport Agreement between the City and scheduled

air transport operators grants to them the right to use the airport facilities at the Chicago Municipal Airport for the operation of planes carrying freight as well as passengers in regularly scheduled service and the monthly fee computed on the number of scheduled trip departures is the sole charge payable by them irrespective of the actual number of trip departures during the month including charter flights. The City, therefore, has no power to charge them any additional fee for their freight carrying planes at the Chicago Municipal Airport."

To the foregoing we may add that the airport agreement grants to each scheduled air transport operator the right and privilege, in common with others to whom similar rights and privileges may be granted, to use the airport facilities for the operation of an air transportation system. The term "air transportation system" is defined in Article I of the agreement to mean "any business conducted for the purpose of transporting, in regularly scheduled service between fixed points, persons, property and mail, or any thereof, by aircraft".

In our opinion the word "property", as used in the foregoing definition, is a general term distinguishable from "persons", and includes everything which may be transported by aircraft as cargo, freight, or express. The language in the preamble of the airport agreement to which you have directed our attention is not inconsistent with this opinion.

"Cargo" is generally understood to apply to goods in transportation by ship, or the ship load. It is the customary nautical term for the word "freight" which, in the United States, is usually applied to property transported by public carriers without calling for or delivery of the goods, as distinguished from that called *express* (Webster). In aeronautical terms the word "cargo" and "freight" are used interchangeably for property in transportation by airship.

It is difficult to determine what the airline representatives had in mind by use of the words "cargo" and "property" in the operation of an "air transportation system". You say that "freight" was never mentioned in the negotiations of the contract. The writer certainly does not recollect any such discussion. That is not to say, however, the airlines did not have in mind the probability of the development in air transportation to permit scheduled freight operations and so used the broad terms "property" and "cargo". Certainly it was known and intended by the City and airlines that *express packages* would be carried by aircraft with or without passengers, since Article XIII of the airport agreement made provision for space in the new terminal building for the use of an express agency.

"Express" is defined in the case of *Southern Express Co. v. St. L. I. M. & S. Ry. Co.*, 10 Fed. 210 on page 213 by Justice Miller.

"I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized; that while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads; that the object of this express business is to carry small and valuable packages rapidly in such a manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like."

All of the questions submitted by you relate to the meaning of terms used in the airport agreement. We have here given you our interpretation of the language employed. But a broader question than any raised in your letter is whether the City had power to enter into a binding contract with the airlines fixing fees and charges for all airport operations at the Chicago Municipal Airport for a term of at least twenty-two years and possibly thirty years. It must be remembered that Chicago Municipal Airport is a *public* airport for the use of all persons without discrimination. The only legal justification for the establishment and maintenance of an air port by the City is that it is for *public service*, in the nature of a public utility owned and operated by the City (McQuillin, Revised, Sec. 1743, note 51).

Municipality owned utilities are governed by the same laws relating to rates and charges as are privately owned utilities. (Pond, Law of Utilities, 4th Ed. Sec. 280; 43 Am. Jur., p. 638; Dillon, Sec. 27; McQuillin, Revised, Sec. 1948; *Springfield Gas Co. v. Springfield*, 292 Ill. 236, 253). Their charges must be just and reasonable at all times and they have no power to enter into long term contracts fixing fees and charges for public use of their facilities (*Public Utilities Com. v. City of Quincy*, 290 Ill. 360; *Chicago Rys. Co. v. City of Chicago*, 292 Ill. 190). The City in the maintenance and operation of a public airport is subject to these well established principles of law.

Section 7 of Article II of the airport agreement grants to the scheduled airline operator, as lessee, the privilege of "loading and unloading persons, property and mail at the airport by such motor cars, buses, trucks or other means of conveyance as Lessee may choose or require in the operation of its air transportation system, * * *." This right is not limited to means of conveyance owned or operated by the lessee. In order to avoid unauthorized interference with operations at the airport the City may require the airlines to specify those whom they have engaged to provide the loading and unloading service. But there is nothing in the agreement which compels the City to lease to Air Cargo, Inc., freight terminal facilities or to consent to any sublease or assignment of a lease on property leased exclusively to any of the scheduled airline operators, and there should be no disposition on the part of the airlines to refuse modification of the airport agreement or to enter into supplemental agreements relating to freight terminal facilities at Chicago Municipal Airport which, as you have said, were not contemplated at the time the airport agreements were made.

CHICAGO ORCHARD AIRPORT

(No. 11076—Commissioner of Public Works—J. C. M.—September 16, 1948.)

Other than during an emergency as declared by the President or the Congress as provided in the agreement relating to the Chicago Orchard Airport, the United States Government has a right to use said airport in common with others and is subject to the same regulations and restrictions as are applied to other aircraft using the airport. The provision in the agreement relating to the use of 25% of the capacity of the airport by the Government does not apply until

the Civil Aeronautics Administration determines that a limitation on the use by the Government is necessary to prevent interference with the use by other authorized aircraft.

Citation: March 14, 1946, Coun. J. pps. 5346-5348.

OPINION OF FOREGOING SYNOPSIS

In your letter of June 28, 1948, you inquire as to the percentage of use that may be made by the United States of the Chicago Orchard Airport.

The ordinance defining the rights of the parties was passed by the City Council on March 14, 1946 (C. J. pages 5346-5348). Section 2, B (1) provides:

"That the Government shall at all times have the right to use the airport in common with others; provided, however, that such use may be limited as may be determined at any time by the Civil Aeronautics Administration or the successor Government agency to be necessary to prevent interference with use by other authorized aircraft, so long as such limitation does not restrict Government use to less than twenty-five (25) percentum of capacity of the airport. Government use of the airport to this extent shall be without charge of any nature other than payment for damage caused by Government aircraft".

Section 2, B (2) provides:

"That during the existence of any emergency declared by the President or the Congress, the Government shall have the right without charge except as indicated below to the full, unrestricted possession, control, and use of the landing area, building areas, and airport facilities or any part thereof, including any additions or improvements thereto made subsequently to the declaration of the airport property as surplus; Provided, however, that the Government shall be responsible during the period of such use for the entire cost of maintaining all such areas, facilities, and improvements, or the portions used, and shall pay a fair rental for the use of any installations or structures which have been added thereto without Federal aid".

Other than during an emergency as declared by the President or the Congress as provided in Section 2, B (2) above, the United States Government has a right to use the present Chicago Orchard Airport in common with others and is subject to the same regulations and restrictions as are applied to other aircraft using the airport. If the capacity of the airport requires a restricted use by the public generally, the United States Government would likewise be restricted. In our opinion the provision relating to the use of twenty-five (25) per centum of the capacity of the airport by the Government does not apply until the Civil Aeronautics Administration determine that a limitation on the use by the Government is necessary to prevent interference with the use by other authorized aircraft.

C. PURCHASING

*See Opinion, re Powers of Purchasing Agent, page 133.

O. P. A. CONTRACTS

(No. 10993—Commissioner, Public Works—A. F. G.—September 3, 1947.)

In contracts containing "escalator" clauses which provide for unit price increases authorized by the O.P.A., the contract price when the O.P.A. was abolished is the last price in effect under O.P.A. for the goods in question.

Citations:

237 III. 610.	340 III. 81.
301 III. 102.	343 III. 94.
334 III. 281.	344 III. 522.
338 III. 391.	346 III. 174, 182.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 3, 1947 is as follows:

"Your opinion is requested on the proper procedure that the Department should follow to secure immediate delivery of unfilled commitments on two supply contracts for the Water Pipe Extension Division or such procedure as will insure subsequent collection of damages on these breached contracts if procurement is made elsewhere.

"Contract No. 14187, dated June 24, 1946, was entered into with the National Lead Company at \$17,500.00 by authority of an action of the City Council on June 18, 1946 and as shown on page 5884 of the Journal of Proceedings of the City Council provided for the furnishing of 100 tons of Lead Pipe at \$0.0875 per pound subject to an escalator clause based on advances of the cost of lead between the date of the contract and delivery as allowed by the OPA. One increase of \$0.017 per pound, effective June 3, 1946, was allowed under the terms of the contract, raising the price to \$0.105 per pound. To date only 39.68 tons of the 100 tons specified for delivery by December 26, 1946 have been delivered.

"After the cessation of OPA control of lead products in November 1946, the contractor has maintained that unit prices should be at market prices.

"This matter was referred to the Department of Law and in an opinion dated December 9, 1946, it was held that the City had no authority under the contract to pay more than the last price fixed by OPA.

"The contractor was informed of the opinion on December 19, 1946 at which time invoices were returned for correction.

"On March 28, 1947 the company was again requested to make delivery on the balance of 60 tons.

"On April 30, 1947, the City notified the contractor that unless an appreciable shipment of the balance of this order would be made within 10 days, the City would take steps to purchase 60 tons of Lead Pipe on the open market in accordance with the terms of the contract.

"On May 14, 1947, the contractor replied that they did not agree with the decision of our Department of Law and that they stood ready to complete the undelivered portion provided the City would authorize the present market price, namely, \$17.50 per Cwt.

"Contract No. 14191, City Specification No. 75-46, was entered into with the National Lead Company, dated June 24, 1946, and provided for the delivery of 30,000 pounds of Plumbers' Solder at \$0.2605 per pound, totaling \$7,815.00, subject to an escalator clause similar to the provisions incorporated in the Lead Pipe contract. This contract was authorized by an action of the City Council on June 18, 1946 and as shown on page 5884 of the Journal of Proceedings of the City Council. The contract price was increased to \$0.2712 per pound in accordance with OPA regulations and terms of the contract, effective June 3, 1946. To date only 5250 pounds of the 30,000 pounds specified for delivery by December 26, 1946 have been delivered.

"Correspondence with the contractor paralleled that for Lead Pipe and the contractor replied in a letter dated May 14, 1946 that they stood ready to deliver provided the City would authorize the market price of \$42.32 per cwt.

"On June 25, 1947, the City Council, and as shown on pages 403-4 of the Journal of the Proceedings of the City Council, authorized the purchase on the open market at going prices, without advertising, of 60 tons of lead pipe as described in City Specification No. 74-46 at an estimated cost of \$21,000 and 24,750 pounds of plumbers' solder as described in City Specification No. 75-46 at an estimated cost of \$10,500.

"The authority to purchase on the open market has not been exercised.

"The bonding companies have not been notified of these conditions.

"The balance of approximately 25,000 pounds of plumbers' solder and the 60 tons of lead pipe are needed by the Water Pipe Extension Division to carry on their regular work and it is most desirable that we have immediate performance under these contracts or prompt procurement from other sources."

In your letter of December 4, 1946 in which you refer to the contract first mentioned in the above letter, you quoted the escalator clause which is as follows:

"the above prices are subject to change should any advance occur in cost of lead between now and the date of delivery as allowed by OPA, on any undelivered portion."

and also make the following statement:

"We have denied any increases after the cessation of OPA price control and have maintained that the terms of the escalator clause permits only increases allowed by OPA and that after the discontinuance of OPA control the unit price is fixed for the life of the contract at the last level set by OPA."

In reply to this letter we said:

"We are of the opinion that your construction of the escalator clause in the contract as set out in the last paragraph of your letter is the correct one. There is nothing ambiguous in the language of the clause which merely provides that the prices are subject to change when advances are allowed by OPA. Upon removal of OPA control the cost of lead pipe is governed by a free competitive market and a contract which permits the vendor to deliver materials at a price which is beyond control, except that of the vendor, is not a contract at all. The contract must be construed to make it effective and binding upon both parties to the contract. The order of the City Council authorized you to execute a contract containing a provision expressly limiting advances in prices to those allowed by OPA. Any different provision would have been beyond your authority to execute.

"It is our opinion, therefore, that you have no authority under the contract to pay more than the last price fixed by OPA."

There is no provision in the contract fixing a different price in the event that OPA should be discontinued. At the time this contract was executed there was much sentiment for removal of price controls. One of the major political parties made abolition of OPA one of the main planks in its platform. The parties to the contract knew of the possibility of the termination of OPA control over prices before the contract was executed and could have in the contract made provision for such a contingency. Not having done so it must be assumed that there was no intention to do so.

In construing a contract our Supreme Court in *Green v. Ashland State Bank*, 346 Ill. 174 (1931) said at page 182:

"In construing a contract effect will be given, if possible, to each clause, phrase and word used in the contract, as it is presumed that the parties meant something by the use of the particular language used by them. (*Weger v. Robinson Nash Motor Co.*, 340 Ill. 81). While it is the general rule that in construing a contract it is proper for the court to take into consideration the surrounding circumstances, this does not give a court the right, by construction, to establish a different contract from that expressed in the written agreement. If a written contract purports on its face to be a complete expression of the whole agreement it is to be presumed that the parties introduced into it every material item and term, and in construing it the court will not add thereto another term about which the agreement is silent. (*Sterling-Midland Coal Co. v. Coal Co.*, 334 Ill. 281; *Armstrong Paint Works v. Can Co.*, 301 id. 102.) No words can be added to or taken from an instrument and thereby change the plain meaning of the parties as expressed therein. (*Stevens v. Felman*, 338 Ill. 391.)";

and at page 183, further said:

"The motives and intentions of the parties can only be known from the writing to which the contract is reduced, and no assumption which is contrary to the language used therein can be based upon any external consideration. (*Emerich Outfitting Co. v. Siegel, Cooper & Co.*, 237 Ill. 610.) The intention must be determined from the language used in the instrument and not from any surmise that the parties used the language to express an intention or meaning they had in mind but failed to express, and if they have overlooked a condition which they would perhaps have provided for if it had occurred to them, the court cannot guess at the provision they would probably have made and by construction read it into the instrument on the presumption that they would naturally have made such provision if they had thought of it. (*LaRocque v. Martin*, 344 Ill. 522; *Foss v. State Bank and Trust Co.*, 343 id. 94.)"

We would suggest you again notify the company that unless the terms of the contract are carried out, you will make purchases in the open market and hold the company liable for the difference between the contract price and the amount the city is required to pay in the open market. Also notify the bonding companies of such intention.

PURCHASING AGENT

(No. 11026—*Purchasing Agent—A. J. R.—February 4, 1948.*)

The Purchasing Agent may act upon bids advertised for, received and opened by other City officials prior to the creation of the office of Purchasing Agent on January 1, 1948.

No Citations.

OPINION OF FOREGOING SYNOPSIS

In a conference participated in by you and a member of your staff, the Commissioner of Public Works and members of his staff, and a representative of this department, our opinion was requested upon the question whether as Purchasing Agent you may act upon bids advertised for, received and opened by other city officials prior to the creation of the office of Purchasing Agent on January 1, 1948.

We are informed that in each of the instances with which this opinion is concerned the following facts are present:

(1) Bids were solicited, received and opened in conformity with the requirements governing those matters;

(2) The lowest responsible bidder was selected;

(3) Authorization by the city council of the award and execution of a contract in conformity with the successful bid was sought prior to December 31, 1947; and

(4) On January 1, 1948 council action had not been taken.

It has been brought to our attention by some of the departments that increased freight rates, rising prices and higher labor costs have created a situation in which new bids would be much higher than those already received.

Among the purposes for which the General Assembly of Illinois passed the new Municipal Purchasing Act none is more important than the economic use of municipal funds. We believe that this purpose will be best served by proceeding to the completion of the making of contracts upon the bids already received provided that the following conditions in each instance are fulfilled:

(1) Your examination of the specifications upon which the bid was based discloses that they are such as you would act upon if they were presented to you now;

(2) Your examination of the advertising for bids discloses that in form and content it was such as you would now employ and that

it conformed to the present requirement of publication at least ten days, excluding Sundays and legal holidays, in advance of the date announced for the receiving of bids, in a secular English language newspaper of general circulation throughout the city of Chicago;

(3) Upon examining the bids you find that the successful bidder made the lowest bid and is the one to whom you would have awarded the contract in accordance with the provisions of the Purchasing Act;

(4) The request made to the city council for authorization of the contract is in effect equivalent to the request you would now make to the city council for approval of the contract; and

(5) As a result of investigation you ascertain reliably that because of the present upward trend of prices of materials and costs of labor as well as increases in freight rates or any other items affecting costs of work or material, or both, the re-advertising for bids at this time would have the result of compelling the city to expend a much larger sum for the work or material, or both, to be contracted for than it would be required to expend under a contract based upon the bid which has been accepted.

If you find that these conditions are fulfilled, you should make representations to that effect to the city council and request approval of the awarding of the contract in each instance.

In our opinion this course will effect a fulfillment of the purposes of the Municipal Purchasing Act, whereas a contrary course would clearly defeat those purposes.

Nothing in this opinion is to be held to mean that bids may be advertised for after January 1, 1948, otherwise than by the Purchasing Agent. In fact, the entire contractual procedure after that date is governed by the provisions of the Purchasing Act, including the provision governing the making of requisitions upon the Purchasing Agent for every purchase or contract.

We adhere to our opinion heretofore given to the Commissioner of Public Works that the Purchasing Act does not apply to any purchase or contract made prior to January 1, 1948, or to anything done after that date in conformity or compliance with such a contract.

PURCHASE OF POSTAGE STAMPS

(No. 11031—Purchasing Agent—A. J. R.—February 17, 1948.)

The purchase of postage stamps and the payment for postage meter registrations are not within the provisions of the Purchasing Act regarding award by competitive bidding.

Citations:

Ordinance: Sec. 22A—Municipal Purchasing Act.
Case: 285 Ill. 647, 649.
59 NYS 2d. 243, 248.

OPINION OF FOREGOING SYNOPSIS

By your letter of January 26, 1948 you requested our opinion upon the application of the Municipal Purchasing Act to the expenditure of \$1,000.00 or more monthly for the purchase of postage stamps and meter registrations to be set on meters under United States Government Permit 575. You submitted with your letter a form of proposed council order authorizing these transactions.

The meter registrations are a substitute for postage and consist of machine-applied markings on the mail to indicate that the amount of the postage for its carriage has been paid.

The proposed council order which accompanied your letter is as follows:

"ORDERED, That the Purchasing Agent is authorized, in accordance with his request of January 26, 1948, to expend \$1,000.00 or more monthly, as needed, for the fiscal year ending December 31, 1948, for stamps and meter registrations to be set on meters under United States Government permit No. 575; and the Comptroller and the Treasurer are authorized and directed to pass vouchers for payment in accordance with the above when approved by the Purchasing Agent."

The question which you submit to us is governed by Section 22A-4 of the Purchasing Act and requires our interpretation of that section.

The pertinent portion of Section 22A-4 is as follows:

"Contracts which by their nature are not adapted to award by competitive bidding, such as contracts for the services of individuals possessing a high degree of professional skill where the ability and appearance of the individual plays an important part, contracts for printing of Finance Committee pamphlets, Comptroller's estimates, and departmental reports, contracts for utility services such as water, light, heat, telephone or telegraph, and contracts for the purchase of magazines, books, periodicals and similar articles of an educational or instructional nature, and the binding of such magazines, books, periodicals, pamphlets, reports and similar articles shall not be subject to the competitive bidding requirements of this Article."

The language of this section is open to two interpretations. The enumeration of instances following the words "such as" might be interpreted as exhausting the meaning of the phrase "contracts which by their nature are not adapted to award by competitive bidding." On the other hand it might be held that such enumerated instances are only a portion of what the legislature intended to include within the phrase last quoted.

There are several decisions in which these possible interpretations of the phrase "such as" are recognized. One is the decision of the Appellate Division of the Supreme Court of New York in *Brooklyn Union Gas Co. v. McGoldrick*, 59 N.Y.S. 2d 243. In that case (at page 248) the court said:

"In support of its contention that the phrase 'such as' should be construed to mean 'of the same general character,' the respondent cites numerous dictionary definitions. While it is true that the phrase 'such as' is sometimes given a broad meaning of general similitude, it is equally true that the phrase is at times given a more restricted meaning of 'not other or different.' The Century Dictionary and Cyclopedia."

We are obliged to adopt the interpretation which appears to express the intention of the legislature.

If we adopt the restrictive meaning we must hold that bidding is required when repair parts, accessories, equipment or services are required for equipment or services previously furnished or contracted for and which can be obtained from only one source (as in the case of a manufacturer who is the sole source of supply for repair parts for machines he has made and sold to the city) and when postage is to be purchased in amounts exceeding \$1,000.00, notwithstanding in this last instance there is not only not more than one source of supply but not more than one price. Other instances to which the bidding process is equally inapplicable might be cited.

In these instances advertising for bids would serve no purpose. It is a fundamental principle that the law does not require performance of a useless act, especially if it involves the expenditure of public funds.

If we adopt the view that the language following the phrase "such as" is not exhaustive or restrictive many awkward and difficult situations which the legislature cannot have intended to create would be avoided. This non-restrictive interpretation therefore seems to be in accord with the legislative intention.

On another ground also the non-restrictive interpretation of the language in question is supported by authority.

In *Wells Bros. Co. v. Industrial Commission*, 285 Ill. 647, one of the recognized rules of statutory interpretation is stated by the Illinois Supreme Court as follows (649):

"It is the cardinal rule in the construction of a statute that it should be so construed that no clause, sentence or word shall be superfluous, void or insignificant; that the statute should be so construed, if possible, that every sentence and word shall be given its ordinary meaning and acceptance."

It is to be observed that if the restrictive meaning is given to the language in question all that portion of the section ending with the words "such as" becomes meaningless and unnecessary since the same meaning would be expressed by beginning the sentence with the word "contracts" which immediately follows the words "such as." The sentence still would be complete and grammatical without any other change.

It is our opinion that the purchases and contracts referred to in Section 22A-4 fall into two categories. The first category includes every purchase order or contract involving a subject matter regarding which in fact there is no price competition and for which there is no competitive substitute. The second category includes purchase orders and contracts involving subject matters for which there may be price competition or competitive substitutes but which purchase orders and contracts are not adaptable to award by competitive bidding for other reasons. These are the contracts included in the enumeration following the words "such as."

In our opinion the purchase of postage stamps and the payment for postage meter registrations are transactions which fall within the first of the two categories above mentioned, the provisions of the Purchasing Act regarding award by competitive bidding do not apply to them and the form of council order which you submitted with your letter is proper as to form and legality.

MUNICIPAL PURCHASING—COAL

(No. 11034—Purchasing Agent—A. J. R.—February 24, 1948.)

The terms of the Municipal Purchasing Act supersede the terms of the Coal Act so as to enable the Purchasing Agent to accept bids for steam coal for the City water works from out of state bidders if such bids are advantageous to the City.

Citations:

Constitution: Art. IX, Sec. 10, Illinois State Constitution.

Statutes: IRS '47, Ch. 29, par. 36.

Public Utilities Act, Sec. 31.

Cases:	228 Ill. 575.	276 Ill. 92.
	239 Ill. 237.	276 Ill. 286.
	264 Ill. 467.	277 Ill. 474.
	266 Ill. 459.	370 Ill. 541.
	269 Ill. 248.	391 Ill. 314.
	269 Ill. 300.	

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of February 9, 1948 in which you request our opinion as to "whether we should entertain proposals on steam coal from out of state bidders where their quoted price per ton may be lower than the bidders of the State of Illinois or where bids were canvassed under the provisions of the steam coal specifications are lower than other bids received from bidders from the State of Illinois.

The General Assembly of Illinois has enacted legislation granting a preference to sellers of coal mined in this state. Section 1 of "An Act concerning the use of Illinois mined coal in certain plants and institutions," filed July 13, 1937 (Ill. Rev. Stats., Chap. 29, Par. 36) provides as follows:

"36. PURCHASE OF ILLINOIS MINED COAL FOR PUBLIC INSTITUTIONS.)

§ 1. The board of trustees or other officer in charge of every institution in the State of Illinois which is supported in whole or in part by public funds or which is owned by any municipal corporation or political subdivision of this State, who are authorized and required to purchase coal for fuel purposes in the operation of any such institution, shall be required to purchase and use coal which is mined in the State of Illinois, if the cost of coal mined in the State of Illinois is not more than ten per cent (10%) greater than the cost of coal mined in any other State or States, including the cost of transportation."

Under that Act the penalty for violating its provisions is a fine not exceeding \$500.00.

The question which you place before us requires us to consider the question whether the Act above quoted is constitutional.

Section 10 of Article IX of the Illinois Constitution, provides that "the General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes. * * * The Supreme Court of this state has uniformly held that while this section does not deprive the General Assembly of the power to impose taxes upon

municipal corporations for purposes not merely local in their character, and the General Assembly may compel a municipal corporation to perform any duty which relates to the security and general welfare of the state, even if the performance of the duty will result in taxation or create a debt to be paid with funds which must be raised by taxation, the General Assembly has no power to compel a municipality to levy a tax for a local non-governmental purpose or to incur with reference to such a purpose any debt or expenditure resulting in taxation or to be paid with funds which must be raised by taxation.

This general rule has been stated by the Supreme Court of Illinois in *People ex rel Sanitary District of Chicago v. Schlaeger*, 391 Ill. 314 (1945) as follows:

"It is settled in this state that the creation of a debt which must ultimately be paid by taxation is the same in its effect as the imposition of a tax itself. (*People ex rel Burrow v. Block*, 276 Ill. 286.) Section 9 of article IX of the constitution authorizes the legislature to vest in municipal corporations the authority to assess and collect taxes for corporate purposes. Section 10 of article IX provides that the general assembly shall not impose taxes upon municipal corporations or the inhabitants or property thereof for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under the authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the municipality imposing the same.

"The rule is definitely settled that if the purpose of the tax is local and not general, the legislature cannot impose the tax upon a municipality or the inhabitants or property thereof. It is only taxes for a local corporate purpose, it is not within the constitutional inhibitory-constitutional limitation. Unless the act complained of imposes a tax for local corporate purpose, it is not within the constitutional inhibition. *People ex rel Moshier v. City of Springfield*, 370 Ill. 541."

We understand that most of the coal you are seeking to purchase will be used for the operation of the city's water pumping stations. This is a corporate, and not a governmental, enterprise. But even if we conceded the power of the legislature to compel the city to purchase coal, a requirement imposed upon the city in the exercise of that power would be complied with by a purchase made at the price specified by the lowest responsible bidder. The Coal Act seeks to compel the municipality to expend a larger sum, viz., the difference between the best price at which suitable coal can be obtained from sources outside the state and a higher price of coal mined in the State of Illinois, if it is not more than ten per cent (10%) greater than the cost of coal mined elsewhere, including the cost of transportation. The amount of the excess over and above the lowest price in such a case, constitutes a subsidy granted to private enterprises carried on in Illinois.

Our examination of the decisions in which the constitutional provision we refer to has been interpreted and applied has failed to disclose any relating to a situation exactly similar to that with which your question is concerned. Nevertheless on the basis of the plain meaning and purpose of the constitutional provision as applied to the equally plain meaning and purpose of the Coal Act, considered in the light of the recognition which the Supreme Court of Illinois has given to the limitations of legislative power in this connection, it is our opinion that it is not within the power of the state legislature to compel the municipality to tax its residents for such a purpose as that for which the Coal Act would require the expenditure of municipal funds; that the Coal Act contravenes the provision of

Section 10 of Article IX of the Constitution of the State of Illinois and for that reason the Act is void so far as it relates to a municipal corporation such as the City of Chicago.

Of course, we express no opinion as to the validity of the Coal Act so far as it relates to institutions owned and operated by the state itself.

For another reason also we are of the opinion that your purchases of coal are not governed by the Coal Act in cases where purchases of coal from outside the state can be made at lower prices (transportation included).

In June of 1947 the General Assembly of Illinois passed the "Municipal Purchasing Act for Cities in Excess of 500,000 Population" which was signed by the Governor on July 21, 1947 and by its terms took effect January 1, 1948. Section 22A-3 of the Purchasing Act provides that all purchase orders involving the expenditure of more than One Thousand (\$1,000.00) Dollars shall be let by free and open competitive bidding after advertisement, to the lowest responsible bidder. An examination of the Act discloses that there are only nine situations in which the Purchasing Agent is not obliged to accept the lowest bid and award the purchase order accordingly. Those nine cases are as follows:

- (1) Where a contract is of such a nature as not to be adapted to award by competitive bidding (Section 22A-4);
- (2) Where a purchase or contract is made in an emergency affecting public health or safety (Section 22A-5);
- (3) Where a contract or purchasing order is awarded to meet an operating emergency (Section 22A-5);
- (4) Where there has been any agreement or collusion among bidders in restraint of freedom of competition (Section 22-8);
- (5) Where there has been a disclosure in advance of the opening of bids, of the terms of the bids submitted (Section 22A-8);
- (6) Where the lowest bidder is not responsible (Sections 22A-3, 22A-10);
- (7) Where all bids are rejected (Section 22A-12); and
- (8) Where the addition of the sales tax differential prevents the lowest bid from being accepted (Section 22A-16).
- (9) Where the city council rejects the recommendation made by the purchasing agent (Section 22A-10).

In any case not falling within one or more of these exceptions the obligation of the Purchasing Agent under the terms of the Municipal Purchasing Act to accept the lowest bid is absolute. It is obvious that in any case where the price specified in a proposal to sell to the city coal from outside the State of Illinois is lower (even with the inclusion of the cost of transportation) than the lowest price specified in any proposal to sell to the city coal mined in the State of Illinois, it would be impossible for you to comply with the Purchasing Act without violating the Coal Act and *vice versa*. Since in every such case compliance with either of these Acts would violate the other, the conflict between them is irreconcilable.

In such a situation the law requires the earlier statute to yield to the later one to the extent that they are irreconcilable.

In *People v. Wabash Railroad Company*, 276 Ill. 92 (1916) the Supreme Court of Illinois applied this rule and stated it as follows:

"Where it is impossible to give effect to both acts the latest in point of time will prevail. (*Ayres v. City of Chicago*, 239 Ill. 237; *People v. Freeman*, 242 id. 152; *Huston v. Newgass*, 228 id. 575.)"

In *New York Central Railroad Company v. Stevenson*, 277 Ill. 474 (1917) the Supreme Court of Illinois held that Section 31 of the Public Utilities Act operated to repeal the earlier Incorporation Fee Act as applied to corporations of the character of the railroad company in that case and stated the rules governing this question as follows:

"The law does not favor repeals by implication, and to justify holding a subsequent provision repealed by a former one by implication there must be repugnancy between the two acts. It is the duty of courts to so construe acts, if possible, that both shall be operative. (Sutherland on Stat. Const. sec. 247.) But repeals by implication are not necessarily within any prohibition of the constitution, and where there is an irreconcilable conflict between two acts, to the extent of the conflict the later amends or repeals the former by implication. (*Holmgren v. City of Moline*, 269 Ill. 248.) Courts will presume that absurd consequences leading to great injustice were not intended, and a construction will be adopted which it may be reasonably assumed was contemplated. The primary object in constructing statutes is to give effect to the true intent and meaning of the legislature. (*Hoyne v. Danisch*, 264 Ill. 467; *People v. Fox*, 269 id. 300.) Where the effect of a later act is not to entirely abrogate a former one but merely to withdraw from the operation of the former act a portion of the cases included within its terms, leaving it in force as to cases not provided for by the later law, the result will be that the earlier act will be in part superseded by the effect of the provision of the later act. (*People v. Sweitzer*, 266 Ill. 459.)"

There is a further respect in which it would not be possible to obey either of these statutes without violating the other. The Municipal Purchasing Act requires the purchase order to be awarded "to the lowest responsible bidder" (Sections A-3, 22A-10, 22A-12, 22A-14 and 22A-15). The Purchasing Act also contemplates that the Purchasing Agent shall determine the responsibility of every bidder and designates what factors he may take into consideration in so doing (Section 22A-11). The Coal Act requires the purchase of coal "mined in the State of Illinois, if the cost of coal mined in the State of Illinois is not more than ten per cent (10%) greater than the cost of coal mined in any other state or states, including the cost of transportation." This provision excludes consideration of the responsibility of bidders and is therefore in conflict with the Municipal Purchasing Act in this respect.

Because of the conflict between the explicit and detailed provisions of the Municipal Purchasing Act and the more general provisions of the Coal Act, it is our opinion that the former must be held to have superseded the latter so far as the purchases made by or on behalf of the City of Chicago are concerned.

In a conference held subsequently to our receipt of your letter of February 9th, the request for an opinion as regards the canvassing of bids under the provisions of the steam coal specifications was withdrawn and for that reason the subject is not discussed in this letter.

PURCHASING DEPARTMENT CONTRACTS

(No. 11036—*Purchasing Agent*—A. J. R.—February 27, 1948.)

The sections of the Municipal Code providing for the retention of a certain percentage of the contract price until completion of the contract applies to construction contracts and has no application to a simple supply contract.

Citation: Municipal Code, 26-12, 26-13, 26-14.

OPINION OF FOREGOING SYNOPSIS

This is in reply to your request for an opinion as to whether in writing supply contracts you may include a provision for full payment at the end of each month for supplies received and accepted. You direct our attention to Section 26-12 of the Municipal Code of Chicago.

This section, together with Sections 26-13 and 26-14, relate to the withholding of a certain percentage of monies due a contractor in order to insure satisfactory completion of his contract.

The language of these sections supports the view that they are intended to be limited to contracts for construction or other work. Section 26-12 provides for payments on account "as the work progresses." Section 26-13 provides for the withholding of a certain percentage "of the monies earned upon such contract to insure the proper performance of the work covered thereby", etc. Section 26-14 requires the Purchasing Agent "to insert in any contract let for any sewer, public improvement, or other work a condition to the effect that it shall and may be lawful for the Purchasing Agent, whenever he shall have reason to believe that the contractor has neglected or failed to pay any subcontractor, workman, or employee for work performed on or about any public improvement, sewer or other work contracted for, to order and direct that no further vouchers or estimates be issued", etc.

It is our opinion that since the sections are applicable only to contracts for construction or other work, there is no legal objection to your contracting to pay for supplies in full at the end of each month.

CHAPTER XIV — PUBLIC IMPROVEMENTS

A. CONSTRUCTION

CONDEMNATION PROCEDURE

(No. 10925—Alderman, 41st Ward—J. F. G.—November 1, 1941.)

The only practical way of minimizing the damage to the City by reason of construction along the route of the proposed superhighway is to require the Building Commissioner, the Commissioner of Subways and Superhighways, and the Law Department to cooperate so that when an application for a building permit is made condemnation proceedings shall be instituted as quickly as possible against the property for which the building application has been made, because under the law of eminent domain the owner of private property taken for public use is entitled to judgment for the value of the property at the time of the institution of the condemnation proceedings.

Citations:

Cases: 143 A. 134 (Penn.)
 5 N. E. (2d) 198 (N. Y.)
Other reference: 20 C. J. 566.

OPINION OF FOREGOING SYNOPSIS

In your letter of October 25, 1946 you direct our attention to protests which have reached your office because of the issuing of permits and continuation of certain construction along the route of the proposed superhighway through your ward, and request our opinion as to whether the Commissioner of Buildings could refuse to issue such permits legally and stop construction on buildings which have already been started.

The office of the Commissioner of Buildings was created to enforce building restrictions imposed by the laws of the State and ordinances of the City of Chicago. The Building Commissioner has no discretion whatsoever to refuse a permit to erect any structure upon private property which complies with the building code and other lawful building restrictions nor may the Building Commissioner stop any work of construction or revoke a permit except for violation of the building code or other building restrictions. There is no law or ordinance which permits the Commissioner of Buildings to refuse a permit for construction in the bed of a proposed street or highway.

The corporate authorities of the City, by law, have power to establish, open, widen and improve public ways. Unless the owner of property voluntarily conveys or dedicates all or any part of his property for a public way the only method by which such property can be devoted to such public use is by the exercise of the right of eminent domain and under the constitution the property cannot be taken or damaged for public use with-

out just compensation. In several States such as in New York, Pennsylvania, Michigan and Wisconsin there are laws which provide that no permit shall be issued for and no building or structure shall be erected on any land located within proposed future outside lines of new, extended or widened streets or highways. Even so, permits for the erection of structures in the bed of such proposed highways cannot be arbitrarily refused to a property owner if the denial of his right to improve his property will seriously impair his use thereof or a reasonable return upon his investment.

In *Headley v. City of Rochester*, (1936 New York) 5 N. E. (2d) 198, the Court of Appeals of New York refused to strike down such a law on complaint of a property owner without proof that the law interfered with or diminished the value of his property. The law had been in effect ten years before the claim was made that the complainant was deprived of his property without proof of actual injury. The court held that a statute cannot have the effect of depriving a person of his property unless it diminishes the enjoyment or profit which he would otherwise derive from his property.

The Supreme Court of Pennsylvania in a decision rendered in the year 1928 went so far as to hold a city ordinance providing for revision of street lines by adding to the width thereof and prohibiting the erection or alteration of a building without receding to the new line constituted the taking of property for public use without making just compensation. (*In Re Sansom Street*, 143 A. 134.) In its opinion the court quoted from 20 Corpus Juris 566 as follows:

"There need not be an actual, physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property."

We do not wish to be understood as saying that the passage of an ordinance establishing a highway over private property without more constitutes a taking of the property for public use but when accompanied by a restriction against the use of the property within the lines of the proposed highway in a lawful manner it may be held by the courts of this State to be the taking of the property for which compensation must be paid.

Restrictions against the use of private property for the purpose of preserving the integrity of a proposed highway are not to be confused, however, with the right of the City to impose a building line restriction and require the setback of buildings under its zoning powers. In the first case the property is taken or damaged for a public use and compensation must be paid therefor under the constitution. In the second case the building restriction is an exercise of the police power of the City to promote public health and safety by providing for adequate light, air, etc. which is not compensable.

We believe that the only practical way of minimizing the damage to the City by reason of construction along the route of the proposed superhighway is to require the Building Commissioner, the Commissioner of Subways and Superhighways, and the Law Department to cooperate so that when an application for a building permit is made condemnation proceedings shall be instituted as quickly as possible against the property for which the building application has been made because under the law of eminent domain the owner of private property taken for public use is entitled to judgment for the value of the property at the time of the institution of the condemnation proceedings.

PROPOSED CIVIC CENTER

(No. 11084—Chicago Plan Commission—A. F. G.—November 24, 1948.)

There are no legal means by which the integrity of the site of a proposed municipal building can be protected during the period between the approval of the site as a civic center and its acquisition by condemnation in the indefinite future which would not do violence to the constitutional provisions for the protection of private property.

Citations:

Constitution: Art. II, Secs. 2, 13, Illinois Constitution of 1870.

Cases: 147 Ill. 66.

180 Ill. 341.

236 Ill. 129.

136 N. Y. 577, 32 N. E. 976.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 29, 1948 in which you refer to a plan your body is preparing for the development of a Civic Center to contain buildings to house the administrative offices of various city departments, as well as offices of appropriate county, state and federal agencies which desire to locate in the Center. The site selected for this Center is bounded by Madison, Wells and Vanburen streets and the south branch of the Chicago River.

You state that development will probably be gradual as the various participating agencies of government embark on new building construction. After the site is officially approved it will be desirable to prevent the erection of costly structures for private use within the site, and your problem is to find a way of protecting the area during the period between the adoption of the plan and its actual development. You ask our opinion as to any legal means available to protect the site from such encroachments, what statutory power the city now has, and what additional legislation is required, if any, to enable it to provide the needed protection of the site against discordant building during the period prior to the completion of the project.

Sections 2 and 13 of the Bill of Rights, Article II of the Constitution of the State of Illinois are as follows:

“Sec. 2. Due Process.

No person shall be deprived of life, liberty or property without due process of law.

“Sec. 13. Private property taken for public use.

Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken.”

These provisions of the constitution guaranty against the appropriation of private property for public use, except upon just compensation, as

well as that against depriving the owner of its enjoyment and possession without due process of law.

The city and the other governmental units have the undoubted right to lay out the proposed area for a civic center for the erection of necessary public buildings, but we question the right of the legislature to restrict the owners of the property of the right to use the property as they see fit pending the acquisition by the city et al. in the indefinite future by condemnation.

Property has been defined as follows:

"Property in its broad sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition over it." *Braceville Coal Co. v. People*, 147 Ill. 66.

A section of the Local Improvement Act authorized the city in the matter of certain special assessments as follows: "Unsubdivided tracts of land may, for the purpose of spreading assessments for house drains and water service pipes, be divided into lots of a frontage of twenty-five feet each; and any fraction of frontage then remaining may be assessed as a fractional lot." In *People v. Cook*, 180 Ill. 341 (1899) it was held that an ordinance based on this statute, dividing a tract into forty-four parcels was void. The decision was not rested on want of an enabling act, but upon the rights of an owner of land. The court said:

"The owner of property cannot be compelled to subdivide his land into twenty-five feet strips fronting up on a street. The owner has a right to subdivide his land in such a way as he sees fit. He may use his own pleasure and best judgment in subdividing it so that it will produce to him the best revenue. A municipality cannot dictate to the owner how he shall divide his land."

Under the provisions of Sec. 2 of the Bill of Rights no person can be deprived of property by legislative act or ordinance. *City of Chicago v. Wells*, 236 Ill. 129 (1908).

In New York a statute authorized a department of the city of New York to file a map of a proposed street or avenue. In a certain case such a map was filed in conformity with the statute. The proposed street was not open and no proceedings had been taken to open it or acquire title to the private property affected by condemnation. Another section of the same act with reference to damages for taking lands for such streets when the same are finally open provided that no compensation shall be allowed for any building, erection or construction which at any time subsequent to the filing of the maps, plans or profiles, may be built, erected or placed in part or in whole upon or through any street, avenue, road, public square or place exhibited on such maps, plans or profiles. In holding that such a provision is in conflict with the provisions of the constitution for the protection and security of private property, the Court of Appeals in *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976 said:

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the constitution, that it must, in terms or in effect,

authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

For the reasons stated in the foregoing quotation we can suggest no means by which the integrity of the site can be protected during the period between the approval of the site as a civic center and its acquisition by condemnation in the indefinite future which would not do violence to the constitutional provisions for the protection of private property.

B. SPECIAL ASSESSMENTS

DUPLICATE SPECIAL ASSESSMENT BONDS

(No. 10803—H. A. C.—July 12, 1944.)

The City Comptroller has no power to issue duplicate special assessment bonds or interest coupons for ones lost or destroyed.

Citation: 21 Op. Corp. Coun. 305.

OPINION OF FOREGOING SYNOPSIS

We have your recent letter in which you referred to our opinion of July 9, 1943 to the City Comptroller of Chicago advising him "that the City Comptroller had no power to issue duplicate bonds in the absence of statutory authorization or a valid order of a court of competent jurisdiction." Your letter asks that we advise you whether legislation has been prepared by this office to be introduced before the legislature of the State of Illinois, and also requests that we inform you as to what order of court would be required to obtain a duplicate and substitute bond for Bond No. 461 in lieu of statutory authorization and what the probable expense of obtaining such an order of court would be.

On June 24, 1942 this office advised the City Comptroller that in the absence of statutory authorization, he has no power to issue duplicate bonds, and at that time we submitted a draft of a bill which, if enacted, would authorize the issuance of duplicate bonds. The session laws of the last meeting of the legislature disclose that no such bill was passed. The legislature of the State of Illinois will not convene in regular session until January 3, 1945.

Opinion No. 10668 addressed to the City Comptroller (Opinion of Corporation Counsel and Assistants, Vol. 21, page 305, (July 24, 1942)) states in part:

"Under present statutes, the City Comptroller has no power to issue duplicate special assessment bonds or interest coupons for ones lost or destroyed."

We are of the opinion that it is impossible to obtain the entry of a valid order of court directing the city to issue a duplicate bond, except in cases where the city has sufficient funds to retire the instrument. The

unpaid principal of the bond in question is \$300 of which the city could now pay the sum of \$160. Therefore, until such time as the collection of special assessments would permit the payment of the entire balance, we would be required to contend that any suit is premature.

We appreciate the difficulties of your client and regret that there is no legal manner in which the city could accept a surety bond and issue a duplicate special assessment bond at this time.

SPECIAL ASSESSMENT BONDS

(No. 10941—J. F. G.—February 10, 1947.)

Money collected in bids at foreclosure sales, less costs of the sale, is divided into proper proportions among the various special assessment warrants involved, and distributed to the bond holders on a pro-rata basis. Bond holders are not necessary parties to foreclosure proceedings, and if dissatisfied with the amount of the guaranteed bid, may appear at the sale and bid on their own behalf.

Citation: IRS '45, Ch. 24, Par. 84-56 (Local Improvement Act).

OPINION OF FOREGOING SYNOPSIS

Your letter of recent date concerning the above subject addressed to R. B. Upham, City Comptroller, has been referred to this department for reply.

You request information as to the status of bondholders after foreclosure suits, and also in answer to the question "Is the city foreclosing special assessments to obtain funds to pay off the bonds?"

At the present time the City of Chicago is proceeding under Section 56 of the Local Improvement Act (Par. 84-56, Chapter 24, Ill. Revised Statutes, 1945) to foreclose special assessment liens in certain instances where it is assured that a reasonable bid will be made at the foreclosure sale. The sales are open to all bidders, including special assessment bondholders who may seek to protect their investments.

The properties involved in foreclosure proceedings are invariably "distressed," that is, so heavily encumbered with delinquent general taxes, special assessments and accumulated penalties, interest and costs prescribed by law, that the owner finds it would be unprofitable to clear the property of these liens. In Cook County foreclosure of delinquent general taxes for the years up to and including 1940 is permitted if the taxes for 1941 and subsequent years are paid in full together with penalties, interest and costs. This results in substantial savings on the taxes prior to 1941, but may not offer sufficient inducement to clear the property if there are large special assessment delinquencies.

In those cases which the City Council deems worthy of attention, it is obvious that the bid at the foreclosure sale will be less than the amount due. The amount realized at the sale, after deducting costs, is divided in the proper proportions among the various special assessment warrants involved, and distributed to the bond holders on a pro-rata basis. It fol-

lows that bonds issued from warrants for which there have been foreclosure sales may never be paid in full.

The Illinois Supreme Court has held that bondholders are not necessary parties to foreclosure proceedings, and if dissatisfied with the amount of the guaranteed bid, may appear at the sale and bid on their own behalf.

In answer to your specific question, please be advised that the City of Chicago is availing itself of a statutory method of enforcing its special assessment liens, and that money collected will be applied on outstanding bonds as above outlined.

PAGE INDEX TO OPINION NUMBERS

Opinion Number	Page Number	Opinion Number	Page Number
10731	49	10782	60
10732	302	10783	451
10733	194	10784	429
10734	545	10785	513
10735	50	10786	149
10736	378	10787	149
10737	428	10788	382
10738	218	10789	221
10739	196	10790	312
10740	52	10791	313
10741	104	10792	315
10742	228	10793	421
10743	144	10794	262
10744	145	10795	124
10745	304	10796	483
10746	441	10797	222
10747	305	10798	507
10748	146	10799	150
10749	108	10800	179
10750	503	10801	180
10751	531	10802	181
10752	53	10803	582
10753	354	10804	182
10754	475	10805	446
10755	259	10806	384
10756	261	10807	509
10757	219	10808	385
10758	59	10809	198
10759	108	10810	534
10760	112	10811	263
10761	113	10812	182
10762	296	10813	264
10763	549	10814	265
10764	113	10815	267
10765	297	10816	198
10766	117	10817	184
10767	307	10818	184
10768	309	10819	316
10769	469	10820	63
10770	381	10821	1
10771	31	10822	317
10772	298	10823	317
10773	119	10824	514
10774	178	10825	150
10775	310	10826	223
10776	121	10827	172
10777	532	10828	476
10778	505	10829	299
10779	122	10830	431
10780	552	10831	319
10781	146	10832	2

Opinion Number	Page Number	Opinion Number	Page Number
10833	229	10887	559
10834	476	10888	38
10835	64	10889	39
10836	152	10890	452
10837	174	10891	473
10838	66	10892	269
10839	68	10893	225
10840	432	10894	238
10841	4	10895	288
10842	387	10896	290
10843	69	10897	41
10844	71	10898	42
10845	155	10899	44
10846	321	10900	454
10847	125	10901	455
10848	322	10902	128
10849	156	10903	395
10850	72	10904	422
10851	6	10905	78
10852	509	10906	80
10853	390	10907	270
10854	516	10908	479
10855	200	10909	397
10856	35	10910	271
10857	391	10911	326
10858	554	10912	534
10859	392	10913	10
10860	434	10914	232
10861	394	10915	398
10862	74	10916	560
10863	436	10917	400
10864	75	10918	561
10865	7	10919	327
10866	477	10920	82
10867	230	10921	517
10868	555	10922	13
10869	8	10923	329
10870	76	10924	330
10871	438	10925	578
10872	323	10926	402
10873	9	10927	518
10874	231	10828	202
10875	187	10929	82
10876	189	10930	84
10877	440	10931	171
10878	158	10932	524
10879	487	10933	45
10880	556	10934	404
10881	36	10935	14
10882	324	10936	405
10883	201	10937	355
10884	443	10938	535
10885	77	10939	546
10886	444	10940	160

Opinion Number	Page Number	Opinion Number	Page Number
10941	583	10995	525
10942	457	10996	203
10943	423	10997	280
10944	175	10998	414
10945	177	10999	133
10946	19	11000	473
10947	207	11001	209
10948	208	11002	204
10949	129	11003	46
10950	86	11004	528
10951	87	11005	48
10952	537	11006	416
10953	130	11007	282
10954	89	11008	139
10955	300	11009	140
10956	406	11010	29
10957	408	11011	142
10958	408	11012	210
10959	424	11013	215
10960	458	11014	548
10961	333	11015	488
10962	132	11016	418
10963	161	11017	511
10964	243	11018	357
10965	273	11019	339
10966	276	11020	340
10967	411	11021	359
10968	334	11022	360
10969	461	11023	162
10970	463	11024	491
10971	247	11025	93
10972	464	11026	569
10973	20	11027	493
10974	547	11028	256
10975	335	11029	361
10976	466	11030	485
10977	252	11031	570
10978	23	11032	211
10979	25	11033	481
10980	90	11034	573
10981	26	11035	542
10982	412	11036	577
10983	92	11037	341
10984	413	11038	362
10985	190	11039	48
10986	252	11040	343
10987	239	11041	344
10988	427	11042	95
10989	27	11043	346
10990	336	11044	292
10991	337	11045	419
10992	278	11046	191
10993	566	11047	420
10994	242	11048	363

Opinion Number	Page Number	Opinion Number	Page Number
11049	237	11074	373
11050	283	11075	562
11051	364	11076	564
11052	538	11077	543
11053	284	11078	499
11054	350	11079	512
11055	164	11080	285
11056	206	11081	98
11057	212	11082	286
11058	244	11083	540
11059	301	11084	580
11060	226	11085	213
11061	486	11086	540
11062	365	11087	352
11063	351	11088	450
11064	193	11089	193
11065	366	11090	530
11066	367	11091	216
11067	368	11092	30
11068	166	11093	377
11069	498	11094	245
11070	370	11095	353
11071	371	11096	258
11072	168	11097	169
11073	468		

INDEX

(References are to opinion and page numbers)

A

	Opinion No.	Page No.
ABANDONED VEHICLES		
Removal of, costs,	10828	476
Sale of, by police department,	11039	48
AIRPORTS		
Abandoned airplanes, disposal of,	11011	142
Chicago Orchard Airport,		
Use of, in general,	11076	564
Fences, liability of city for,	10952	537
Hangars, regulations regarding construction of,	10917	40
Inflammables, storage of,	10848	322
Leases,		
Concessions,	11035	541
Freight terminal,	11075	562
ALIEN PROPERTY		
Custody of, by police department,	10881	36
AMUSEMENT TAX ORDINANCE		
In general,	11029	361
Activities subject to,		
Amusement park,	11067	368
Board of Education, athletic contests,	11017	511
Board of Education, athletic contests,	11065	366
Hotels, ballrooms,	11071	371
Livestock exhibitions,	11074	373
Lodge halls,	11051	364
Private clubs, in general,	11021	359
Private clubs, computing for,	11048	363
Travel shows, Navy Pier,	11022	360
University programs,	11018	357
Coin operated machines,		
<i>Horoscope</i> machines,	11038	362
Radio	11062	365
<i>Telequiz</i> machine,	11070	370
ANNEXATION		
Cemetery,	10759	108
Lake Michigan, filled in area,	10873	9

	Opinion No.	Page No.
ATTORNEY'S FEES		
City official, reimbursement of,	10752	53
B		
BIDS		
Advertisement for, requiring union label,	11086	540
Bonds, effect of use of,	10939	546
Coal, from outside state,	11034	573
Postage Stamps, exempt from,	11031	570
Purchasing Agent, handling of,	11026	569
Sales tax, provision in,	11014	548
BIRTHS		
Registration of, illegitimate child,	10950	86
BONDS		
See <i>Funds</i>		
BRIDGES		
Control of, by city	10869	8
BUILDINGS		
Airport hangars,	10717	400
Apartments,		
In general,	10934	404
Vestibule lights in,	10770	381
Aperture, definition of,	10936	405
Balcony, definition of,	10857	391
Code,		
Use of by outside municipality,	10833	229
Retroactive effect of,	10842	387
	10903	395
	10926	402
Dangerous structures,		
In general,	10808	385
Wrongful removal of,	10859	392
Day Nursery, (<i>See under that title</i>)		
Elevated stations, control of,	10796	483
Elevators,		
Inspection of,	10965	273
Escalators,	10909	397
Fire limits, moving buildings into,	10861	394
Frontage consents, (<i>See under that title</i>)		
Garage, revoking license of,	10998	414
Government buildings, control of,	10814	265
Hotels, apartment,	10956	406

BUILDINGS—Continued

	Opinion No.	Page No.
Inflammable liquids, Storage of,	10848	322
Inspection, (<i>See under that title</i>)	.	.
Jurisdiction, building department,	10958	408
Medical Center district,	11006	416
Mezzanine, definition of,	10857	391
Oil, permit for storage of,	10911	326
Openings, walls, and windows,	10936	405
Permits,		
Refund of fee,	10747	305
Person, definition of, as used in Code,	10957	408
Public buildings, smoking prohibited in,	11082	286
Public halls, placards for,	10737	428
Parking lots, <i>See under title Parking</i> ,		
Smoking, prohibited in public buildings,	11082	286
State buildings, control of,	10736	378
Storage,		
In general,	10853	390
Warehouses, parcel depots,	10982	412
Stockyards, permits in,	11045	419
Tenement house, definition of,	10934	404
Trailers, location of,	11047	420
Violations, warrants for,	10806	384
Walls, openings in,	10788	382
Water tanks, height of,	10967	411

C**CEMETERY**

Annexation of,	10759	108
Location, within city limits,	10871	438

CHICAGO HOUSING AUTHORITY

Employees of, Hatch Act,	11013	215
Federal employees, homes for,	10742	228
Funds, investment of,	11091	216

CHICAGO PUBLIC LIBRARY

Funds, use of for educational programs	10953	130
Pamphlets, sale of, by	10764	113
Librarian, status of,	11097	169

CHICAGO TRANSIT AUTHORITY

Accidents, investigation of, by police department	11005	48
Elevated pillars, removal of	10890	452
	11024	491
	11069	498

	Opinion No.	Page No.
CHICAGO TRANSIT AUTHORITY—Continued		
Elevated stations, building regulations,	10796	483
Right of way, maintenance of,	11015	488
Safety islands, maintenance of,	10879	487
	11078	499
Wheel tax, in general,	11027	493
 CHICAGO TUNNEL COMPANY		
Steam transmission,	10989	27
 CHICAGO WELFARE ADMINISTRATION		
Employees,		
in general,	10849	156
salaries, fixing of,	10845	155
Records, destruction of,	10884	443
Repayment, for treatment,	10886	444
Treatment, payment for,	10992	278
Treatment, by County hospital,	10746	441
Unclaimed goods, disposal of,	10756	261
 CHILDREN		
Abandonment of,	10794	262
 CHRISTIAN SCIENTIST		
Medical treatment, compelling,	10758	59
 CIGARETTES AND CIGARETTE DEALERS		
License, private club,	10732	302
Location, near school	11050	283
Wholesale tobacco house, license for,	10819	316
 CITY CLERK		
Licenses, hunting and fishing, commissions from,	10776	121
 CITY COUNCIL		
Amusement tax Ordinance, (<i>See that title</i>)		
Attorney's fees, of city official,	10752	53
Bridge bonds, surplus account for,	10785	513
Bridges, control of by city,	10869	8
Civic center, proposed site,	11084	580
Contracts, approval of,	10974	547
Costs of commission hearings,	11010	29
Disabled veterans, parking privileges,	10979	23
Duties, departmental, transferring,	10832	2
Fences, see that title,		
Inspection, locomotives	11009	140

	Opinion No.	Page No.
CITY COUNCIL—Continued		
Inspection, police records, (<i>Also See title Inspection</i>)	10856	35
Junk dealers, ordinance for,	10841	4
Legislative Reference Bureau,	10935	14
License fee, accepting lesser amount,	10973	20
Police records, inspection of,	10856	35
Salaries, fixing of,	11092	30
Salaries, increases in,	10851	6
School levy,	10946	19
Smoking Ordinance, public places,	11082	286
Taxicabs (<i>See that title</i>)		
Tickets (<i>See that title</i>)		
Waste containers, advertising on,	10942	457
Water (<i>See that title</i>)		
 CITY PROPERTY		
Trees, care of,	11008	139
Trucks, riding on,	10902	128
 CIVIL SERVICE		
Age, on application,	10878	158
Alien doctors, appointment of,	10735	50
Debt, refusal to pay,	11023	162
Examinations, license requirement in,	11068	166
Firemen, outside employment,	10962	132
Layoffs,	10981	146
Library,		
Librarian status of,	11097	169
Military service,		
Coast Guard, service in,	11072	168
End of World War II,	10963	161
Merchant Marine, service in,	10748	146
Preference for,	10836	152
Resignation while in,	10940	160
Returning from,	10825	150
Outside employment,		
Physicians,	10885	77
	10920	82
Firemen,	10962	132
Physicians, (<i>See outside employment, this title</i>)		
Resignations,		
Insane employee,	10744	145
	10786	149
Military service, while in,	10940	160
Refusal to accept,	10787	149
Withdrawing,	10743	144

	Opinion No.	Page No.
COAL		
Bids, outside of state,	11034	573
Emergencies, seizing private supplies,	10741	104
COIN OPERATED MACHINES		
<i>All Star Hockey Game</i> , gambling,	10889	39
<i>Horoscope machine</i> , amusement tax,	11038	362
Radio, amusement tax,	11062	365
<i>Telequiz</i> , machine,	11070	370
CONDEMNATION		
Procedure, in general,	10925	578
CONTRACTS		
In general,	10868	555
City Council, approval of, by,	10974	547
Fair employment provision in,	10887	559
O.P.A. provision in,	10993	566
Purchasing Agent,	11036	577
Bonds, special assessment,	10803	582
Leases,		
In general,	10858	554
Airport,		
Chicago Orchard,	11076	564
Concessions,	11035	541
Municipal Tuberculosis Sanitarium,	10916	560
Sale of,	11077	543
Retailer's Occupation Tax,		
In general,	10734	545
	10763	549
	10780	552
	11014	548
	11079	512
House of Correction, sales to,	10798	507
Municipal Tuberculosis Sanitarium, sales to,	10906	80

D**DAY NURSERIES**

Building code,	10984	413
Operation of, by Board of Education,	10843	69
Permit, inspection for,	10839	68
Private homes, operation in,	11042	95
Tavern, located near,	10994	242

DEATH

Certificates of,		
at County Morgue,	10905	78
by undertaker's assistant,	10980	90

DOGS

	Opinion No.	Page No.
Dog Advisory Committee, Witnessing experiments,	11025	93

DRIVEWAYS

Permits for,	10768	309
--------------	-------	-----

DUMPING

Permits for, in general,	11087	352
Illinois and Michigan Canal, use of,	10779	122
Waste containers, advertising on,	10942	457

DUTIES

Transferring of, to other departments,	10832	2
--	-------	---

E**ELECTRIC CURRENT AND EQUIPMENT**

Electric mousetrap,	10907	270
---------------------	-------	-----

**ELECTION COMMISSIONER'S ANNUITY AND
BENEFIT FUND**

Per diem employees,	11032	211
Re-entry of annuitant, different department,	10948	208

EMPLOYEES OF CITY

Debt, refusal to pay,	11023	162
Federal Funds, paid by,	10820	63
Income tax, collecting,	11060	226
Inventions of,	10740	52
Outside employment,		
firemen,	10962	132
physicians,	10885	77
physicians,	10920	82
Riding on outside of trucks,	10902	128
Sick leave,	10931	171
Temporaries,		
policemen,	10888	38
policemen and firemen,	11055	164

F**FEDERAL EXCISE TAX**

Computing—City Amusement tax,	11029	361
Police merit badges,	10797	222

	Opinion No.	Page No.
FENCES		
Airport, liability for,	10952	537
Control of, by ordinance,	10813	264
Proposed ordinance,	10830	431
River, adjacent to,	10978	23
FINGERPRINTS		
Destruction of, by police department,	10897	41
FIRE DEPARTMENT		
Forcible entry by,	10773	119
Jurisdiction, buildings,	10958	408
FIREMEN'S ANNUITY AND BENEFIT FUND		
Application, age stated on,	10817	184
Assistant telegraph repairmen,	10774	178
Disability benefits, in general,	10812	182
Disability pension, in general,	11046	191
fixing of disability,	10802	181
fixing final annuity,	10801	180
Leave of absence,	11064	193
Paying benefits,	10800	179
Pension deductions,	10876	189
Re-employment, fireman on pension,	11089	193
Re-entry, different department,	11085	213
Refunding, pension deductions,	10804	182
Transferring, pensions,	10875	187
Widow, word defined,	10818	184
F		
FOOD ESTABLISHMENT		
Factory, license for in,	11049	237
FRONTAGE CONSENTS		
Filling Station,		
In general,	10988	427
Hospital,		
In general,	10959	424
	10988	427
existing,	10943	423
	10954	89
Hotels,		
business in,	10904	422
FUNDS, CITY		
Breakwater repairs, use of, for,	11090	530
Bridge bonds, surplus account,	10785	513
Bonds, expenses of issuing,	10921	517
Chicago Transit Authority, bills of,	10927	518

G

GAMBLING AND LOTTERIES

<i>All Star Hockey Game</i>	10889	39
Amusement Machine ordinance,	11096	258
Destroying gambling equipment,	10933	45
Night club, quiz show in,	10986	252
Raffle, automobile,	11028	256
Slot machines, money in, confiscated,	10977	252
Theaters, jingle contests in,	10971	247

H

HEALTH, BOARD OF

Advisory meetings, proxy voting at,	10835	64
Alien doctors, appointment of,	10735	50
Birth registrations, (<i>See Births</i>)		
Christian scientist, compelling treatment,	10758	59
Contagious diseases,		
Control of,	11081	98
Day nurseries, (<i>See Day Nurseries</i>)		
Death certificate, (<i>See Deaths</i>)		
Donations, Municipal Tuberculosis Sanitarium,	10930	84
Federal funds, employees paid by,	10820	63
Infants, care of, in private homes,	11042	95
Milk, permit for, (<i>Also See Milk and Milk Products</i>)	10850	72
Minor, consent to treatment,	10782	60
Physicians,		
Outside employment,	10885	77
Outside employment,	10920	82
Power, entering private property,	10870	76
Rules, adopting of,	10864	75
School children, faulty vision of,	10929	82
Sick persons, care of by municipality,	10731	49
State regulations, adoption of,	10864	75
Trainee patients, Municipal Tuberculosis Sanitarium,	10838	66
Tuberculosis patients, compelling care for,	10755	259
Vaccination, responsibility for,	10951	87

HORSES

Licensing of, and riders,	10922	13
---------------------------	-------	----

HOSPITALS

Frontage consents,	10943	423
	10954	89

	Opinion No.	Page No.
H		
HOUSE OF CORRECTION EMPLOYEE'S PENSION FUND		
Certification, after age of 35,	11057	212
Trustee, replacement of,	11012	210
I		
INCOME TAX, (<i>See same under United States</i>)		
INSPECTION		
<i>(Also see same under Buildings)</i>		
Bottled gas plants,	11007	282
Electric mousetrap,	10907	270
Elevators, field museum,	10965	273
INVENTION		
City employee, rights to,	10740	52
J		
JUDGMENT		
Enforcing against city employee,	10913	10
JUNK DEALERS		
Ordinance regulating,	10841	4
L		
LABORER'S ANNUITY AND BENEFIT FUND		
Child's annuity, illegitimate child,	11001	209
LAKE MICHIGAN		
Annexing filled in area of,	10873	9
LEASES		
<i>(See same under Contracts)</i>		
LEGISLATIVE REFERENCE BUREAU		
creation of,	10935	14
LIABILITY OF CITY		
Drivers of city vehicles,	11083	540
Fences, airport,	10952	537
Railroad, construction damage to,	10777	532
Sewers, damage from,	11052	538
Students, injuries of,	10795	124
Traffic signals, faulty,	10938	535
Vaccinations, negligence in,	10951	87

	Opinion No.	Page No.
LICENSES		
Animals, in general,	11095	353
Archery range,	10792	315
Beauty shop,	10791	313
Cigarette dealers, (<i>See that title</i>)		
Corporations,		
foreign, order office in city,	11019	339
Deposit receipt, operating with,	10895	288
Engineers, (<i>See Civil Service</i>)		
Fees,		
Accepting when amount in dispute,	10973	20
Lapsed, mason contractors,	10872	323
Refund of,		
Building permit,	10747	305
Charitable institutions,	10753	354
Unused portion,	10937	355
Florists,		
Retail,	10846	321
Wholesale,	10991	337
Hardware,		
Sale of, in chain stores,	11037	341
Insurance, brokers,	11020	340
Junk dealers,	10841	4
Launderettes,	10882	324
Liquor, (<i>See that title</i>)		
Magazine solicitors,	10919	327
Movie projection machine operators,	10823	317
Parking lot,	11066	367
Photographers,		
Itinerant,	10990	336
Supplier of,	11040	343
Plumbers,		
In general,	11043	346
Master,	10961	333
Potato washing business,	10924	330
Radios, coin operated,	11062	365
Restaurants, (<i>See that title</i>)		
Revocation,		
Racial discrimination,,	10949	129
Taxicabs, (<i>See that title</i>)		
Ticket sellers, (<i>See Tickets</i>)		
Tobacco, wholesale warehouse,	10819	316
Travel ticket brokers,	10790	312

L**LIQUOR AND LIQUOR DEALERS**

Control, proposed ordinance,	11044	292
Deposit receipts, operating with,	10895	288

	Opinion No.	Page No.
LIQUOR AND LIQUOR DEALERS—Continued		
Licenses,		
Limiting by ordinance,	10894	238
Private Club,	10987	239
Refunding unused portion,	10937	355
Successor owner, license of,	10896	290
Tavern, location near day nursery	10994	242
LITERATURE		
Obscene, suppression of,	10966	276
LOTTERIES		
<i>(See Gambling)</i>		
M		
MAYOR		
Police records, inspection of by,	10856	35
Revocation power, garage license,	10998	414
MILITARY		
Use of word "Military",	10898	42
MILK AND MILK PRODUCTS		
Ice cream, sale of, outside city,	10983	92
Permits, sale in factory,	10850	72
Standards of,	10862	74
M		
MINORS		
Consent of, for medical treatment,	10782	60
Court, personal affairs of in,	11080	285
MOTOR FUEL TAX FUND		
Uses of, in general,	10852	509
MOTOR VEHICLES		
Buses,		
Chartered, outside city,	10972	464
Playground,	10970	463
School,	11063	351
Chicago Transit Authority,	11027	493

	Opinion No.	Page No.
MOTOR VEHICLES—Continued		
City owned, State Responsibility Act,	10874	231
Defense Plant Corporation,	10765	297
	10772	298
Federal Government,		
Operated by,	10745	304
Owned by,	10757	219
Interstate trucks,	10955	300
Non-resident owned and operated,		
In general,	11059	301
Vehicles,	10762	296
Trucks,	10829	299
Used cars, on lot,	11053	284
 MUNICIPAL COURT		
Foreign consul, jurisdiction over,	10867	230
 MUNICIPAL EMPLOYEE'S ANNUITY AND BENEFIT FUND		
Alderman, member of fund,	10945	177
City, pension contributions of,	10827	172
Merchant Marine, service in,	10944	175
Re-entry, in same department,	10947	207
Widow's Annuity	10837	174
 MUNICIPAL TUBERCULOSIS SANITARIUM		
Donations to,	10930	84
Fireman on pension, employed by,	11085	214
Leases of,	10916	560
Non-resident veterans, admission of,	10844	71
Physicians,		
Outside employment of,	10885	77
	10920	82
Sales tax, contracts involving,	10906	80
Trainee patients, payment to,	10838	66
Vaccination, responsibility for,	10951	87

N

NOISE ABATEMENT

Outdoor amplifying system,	10910	271
----------------------------	-------	-----

NORWOOD TOWNSHIP

Water, sale to residents of,	10821	1
------------------------------	-------	---

	Opinion No.	Page No.
O		
OFFICIALS		
Attorney's fees of, reimbursement,	10752	53
Buildings, responsibility for removal of,	10859	392
Election contest, expenses, reimbursement,	10766	117
Purchasing agent, powers of,	10999	133
Tenure of,	10981	26
OFFICE OF PRICE ADMINISTRATION		
Bread, increase in size and price,	10789	221
Contracts, provisions in,	10993	566
P		
PANDERING		
Crime of, punishment,	10811	263
PARKING		
Disabled veterans, privileges,	10979	25
Lots,		
Bowling alley, use of,	10915	398
License for,	11066	367
Municipality owned,	10865	7
PAWNBROKER'S		
Receipt, requirements on,	10767	307
Use of mails by,	10831	319
PLAYGROUNDS		
Leasing of, by city,	10918	561
P		
POLICE, DEPARTMENT OF		
Automobiles, abandoned, sale of,	11039	48
Chicago Transit Authority, investigations,	11005	48
Custodian, sale by,	11003	46
Custody of alien's property,	10881	36
Fingerprints, destroying,	10897	41
Gambling equipment, destroying,	10933	45
Merit badges, federal tax,	10797	222
Obscene literature, suppressing,	10966	276
Petitions, soliciting on street,	11073	468
Private watch service (<i>See that title</i>)		
Records, inspection of,	10856	35
Returning property of accused,	10771	31
Returning records on acquittal,	10899	44
Special police (<i>See under title Private Watch Service</i>)		
Tear gas fountain pen, prohibiting sale of,	10964	243
Temporary appointees, age of,	10888	38

	Opinion No.	Page No.
POLICEMEN'S ANNUITY AND BENEFIT FUND		
Adopted children,	10996	203
Deductions,		
Refund of,	10739	196
Transferring,	10816	198
Waiving refund,	10928	202
Disability benefit,		
To member in armed forces,	10733	194
Discharge from force, effect of,	10855	200
Police custodian, money from,	11056	206
Receipts of police custodian sales,	11003	46
Temporary policemen, deductions of,	11002	204
Widow's Annuity,		
In general,	10883	201
Increasing,	10809	197
PRIVATE WATCH SERVICE		
Special police, in general,	11054	350
Special protection, in general	10976	466
PROXY VOTING		
Board of Health, advisory committee of,	10835	64
PURCHASING AGENT		
Bids, handling of,	11026	569
Coal, purchase of,	11034	573
Contracts, in general,	11036	577
Postage stamps, purchase of,	11031	570
Powers of, in general,	10999	133
R		
RAILROADS		
Damage to, by city	10777	532
Locomotives, in general,	11061	486
Viaducts, lights in,	11030	485
RESTAURANTS		
Factory, operation in,	11049	237
Government building, operation in,	10822	317
Hotels, operation in,	10840	432
RETAILER'S OCCUPATION TAX		
<i>(See same under Contracts)</i>		

	Opinion No.	Page No.
S		
SALARIES		
Fixing of, by city council,	11092	30
Increasing, per diem employees,	10851	6
SALES, BY CITY		
Increase in price of maps	10760	112
Increase in price of pamphlets	10761	113
Public library, pamphlets,	10764	113
SALES TAX		
<i>(See Retailer's Occupation Tax under Contracts)</i>		
SCHOOLS		
Cigarettes, sale of, near,	11050	283
Tax levy for,	0946	19
SMOKE INSPECTION AND ABATEMENT,		
DEPARTMENT OF,		
Jurisdiction, deputy smoke inspector,	10815	267
Railroad locomotives,	11009	140
	11061	486
SMOKING ORDINANCE		
Provisions of, in general,	11082	286
STATE OF ILLINOIS		
City liability, as affecting,	11083	540
Financial Responsibility Act,	10874	231
STREETS AND ALLEYS		
Billboards, removal of,	10891	473
Bridges, on state routes,	10880	556
Buses, control of,	11033	481
Dedication of, approval of plat,	10805	446
Lights, advertising on,	10769	469
Obstructions, removal of,	10783	451
Paving, by private individual,	10810	534
Plat, approval of, in general,	11088	450
Railroad viaducts, lights in,	11030	485
Scales, alley, fee for,	10738	218
Signs, overhanging electric,	11000	473
Snow removal, funds for,	10995	525
Street car tracks, removal of,	10890	452
Subways, <i>(See that title)</i>		
Superhighways, <i>(See that title)</i>		
Traffic, <i>(See that title)</i>		

	Opinion No.	Page No.
STREETS AND ALLEYS—Continued		
Use of,		
In general, petitions,	11073	468
Gasoline trucks,	10900	454
Private watch service lines,	10976	466
Telegraph lines,	10969	461
STRIKES		
Control over, by city,	10892	269
SUBMARINE CABLE		
Damage to,	10826	223
SUBWAY		
Judgments, judgment tax fund,	10912	534
SUPERHIGHWAY		
In general,	10854	516
Building along, leasing of,	10824	514
T		
TAXES		
Real estate, delinquent,	10750	503
Sales, (<i>See Retailer's Tax under Contracts</i>)		
School, levy for,	10946	19
TAXICABS		
License,		
Ordinance regarding,	10975	335
assignment of,	10751	531
Ownership agreement,	10901	455
TELEVISION		
Programs, control of,	11094	245
TICKET BROKERS		
In general,	1960	458
Travel tickets,	10790	312
TRAFFIC		
Lights,		
Advertising on,	10769	469
Costs of, Motor Fuel Tax Fund,	10778	505
Faulty, liability for,	10938	535
Single—suspension type, use of,	10908	479

	Opinion No.	Page No.
TRAFFIC—Continued		
Vehicles,		
Abandoned, removal of,	10828	476
Control of,		
Speed laws, in general,	10866	477
Speed limit signs,	10834	476
Motor buses,	11033	481
Violations,		
Summonses, tie on,	10754	475
TREES		
Care of, on parkways,	11008	139
U		
UNITED STATES		
Dredging damage, liability for,	10826	223
Employees, names for,	10742	228
Income tax, city employees,	11060	226
Vehicle Tax, liability for,	10757	219
V		
VACCINATION		
Responsibility of city, negligence,	10951	87
VEHICLE TAX FUND		
Authorized uses,		
In general,	11004	528
Chicago Transit Authority, subject to,	11027	493
Snow removal, costs of,	10995	525
Traffic lights, costs of,	10778	505
Trees, care of,	11008	139
W		
WATER		
Supply,		
Depriving tenants of,	10997	280
Douglas airport,	10893	225
Non-residents, furnishing to,	10821	1
Rates,	10847	125
Rates,	10932	524
Tanks, in general,	10967	411

	Opinion No.	Page No.
WATERWAYS		
Bridges, control of by city,	10869	8
Dredging, damages, from,	10826	223
Dumping in, Illinois and Michigan canal,	10779	122
WEAPONS		
Air rifles, sale of,	11058	244
Tear gas fountain pen, sale of,	10964	243
WEIGHTS AND MEASURES		
Purchases outside city, coal,	11041	344
Weight certificates, Arlington Heights,	10914	232
WELFARE		
(<i>See Chicago Welfare Administration</i>)		
WHEEL TAX		
(<i>See Vehicle Tax Fund</i>)		

Z

ZONING		
Beauty shops, in home,	10877	440
Board of Zoning Appeals, decision of,	10860	434
Cemetery, within city limits,	10871	438
Fences, proposed ordinance,	10830	431
Frontage consents, (<i>See that title</i>)		
Hotel, restaurant in,	10840	432
Parking lot, adjacent to bowling alley,	10915	398
Placards, public halls,	10737	428
Posters, regulations,	10775	310
Residences, exclusion of,	10863	436
Storage houses, parcel delivery,	10982	412
Trailers, location of,	11047	420

